Oct. 14
~~Dec. 10 & 11~~
Argued
164-703, 704

Brewer

164-703-704

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~304~~. XX 14

THE CHICAGO, ST. PAUL, MINNEAPOLIS, AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN ROBERTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED APRIL 22, 1892.

(15,024.)

(15,024.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 394.

THE CHICAGO, ST. PAUL, MINNEAPOLIS, AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 18, 1895.

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1 STATE OF MINNESOTA, } ss:
County of Scott, }

District Court, Eighth Judicial District.

JOHN ROBERTS, Plaintiff,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Defendant.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which is hereto attached and herewith served upon you, and to serve a copy of your answer to said complaint on the subscriber, at his office, in the city of St. Paul, in the county of Ramsey, in said State, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will upon such
2 failure have the amount he is entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so ascertained, together with the costs and disbursements herein.

Dated ——, A. D. 188–.

J. L. MACDONALD,
Plaintiff's Attorney, St. Paul, Minn., Globe Building.

STATE OF MINNESOTA, } ss:
County of Scott, }

I hereby certify that on the 15th day of October, 1890, in said Scott county, Minnesota, I served the annexed summons and complaint upon the therein-named defendant The Chicago, St. Paul, Minneapolis & Omaha Railway Company by leaving a true copy thereof with George Devoe at the Shakopee station of the said defendant, said George Devoe being the acting freight and ticket agent of said defendant at the said Shakopee station.

THEO. WEILAND,
Sheriff, Scott County, Minn.

Fees: Service, $1.00; mileage, .20; copy, $1.40—$2.60.

Complaint.

(Title of Cause.)

The above-named plaintiff, for complaint against the said defendant herein, respectfully shows to the court, and alleges:
3 That said defendant is, and for more than one year last past has been, a corporation, duly organized under and pursuant to the laws of the State of Wisconsin, and was duly author-

ized by the laws of the State of Minnesota to acquire, own and operate the railroads hereinafter named; and it was, and is for the purpose of this action, a domestic corporation of the State of Minnesota, under and pursuant to the said laws thereof; and that it was during that time the owner of a certain railroad extending from the city of St. Paul, in said State, and through said State of Minnesota to Sioux City, in the State of Iowa, which railroad was formerly named the St. Paul and Sioux City railroad, which was, and is now, known as the Western division of the Chicago, St. Paul, Minneapolis and Omaha railway, of defendant, together with the tracks, rolling stock, cars, locomotives, water tanks and other appliances thereunto belonging, and then and there operated said railroad, and was a carrier of freight and passengers thereupon for hire, and that it then and there became, and was, the duty of the said defendant to procure and have good and safe and properly constructed and located railroad and tracks, water tanks, locomotives, machinery, and other appliances and apparatus to operate said railroad.

That on the 7th day of March, A. D. 1890, the said plaintiff was employed by said defendant as a fireman upon one of its said locomotives, at and for a certain hire and reward agreed upon by the parties hereto in that behalf, and on that day was so employed upon said locomotive at the village of St. James, in the county of
4 Watonwan, in the State of Minnesota, the said locomotive being then and there used for the purpose of hauling trains of freight cars from the city of St. Paul to the village of St. James, and from said village of St. James to said city of St. Paul; and that said plaintiff had only been engaged as a fireman as aforesaid upon locomotives hauling trains from the said city of St. Paul to the said village of St. James and back to said St. Paul a short time, and did not before the injury herein complained of know or have notice of the defective and negligent construction and location of tracks and water tanks, as herein stated.

That said defendant in the construction of its said railroad and appliances thereto belonging, including its side tracks and water tanks thereunto belong- and connected therewith, and in the operation of its said railroad, engines, locomotives and trains thereof, conducted itself so carelessly, negligently and unskillfully, as hereafter stated, that by and through the carelessness, negligence and default of said defendant and its servants it provided, used, and suffered to be used, an unsafe, defective and improperly constructed railroad, and side track and a water tank used in connection therewith, at said village of St. James, and carelessly and negligently operated the same, and injured this plaintiff, as hereinafter stated.

That in and at said St. James there is owned and operated by said defendant, as a part of its said railroad and appliances, a turn-table, to turn or reverse locomotives and cars, and a side track leading from the main track of said railroad to said turn-table, and that near the point where this side track intersects the said main
5 track there was, and is, a water tank, from which the locomotives of defendant operated on said railroad can there be

supplied with water, and that the base or substructure of said water tank was about twelve feet square.

That the said carelessness, negligence, unskillfulness and default of said defendant, herein complained of, consisted in this: That said water tank and side track were constructed and located too near to each other, and not more than two feet apart, and so negligently and carelessly constructed and located that in passing the same on said side track the side of the locomotives then and there used by said defendant and the tenders thereof, and next thereto, including the one on which plaintiff was then so employed, would not be, and was not, more than four inches from said water tank and base or substructure thereof; and that on the 7th day of March, A. D. 1890, the said locomotive upon which the said plaintiff was then employed and engaged, as hereinbefore stated, was standing upon the said side track a short distance from said water tank, and after having been turned around and reversed upon said turn-table, with the engineer thereof and this plaintiff thereon, and that while so then and there upon said locomotive this plaintiff, in the line of his duty as fireman thereof, and the proper and necessary performance thereof, stepped out of the cab of said locomotive upon the rim or side of the tender and tank thereof and thereto attached, to get some material called "waste" from the proper receptacle thereof, to wipe off and clean said engine or portions thereof; and that immediately after so stepping out upon the rim of said tender, and without any notice to said plaintiff, and before plaintiff could return into said cab, or leave where he then was, or escape therefrom, or avoid being caught and injured, the said engineer, without knowledge of this plaintiff, or notice to him, or any fault or negligence upon the part of this plaintiff, in response to the orders of the conductor in charge, started and moved said locomotive towards said main track, and thereupon and immediately thereafter this plaintiff was, by reason of the negligence herein mentioned, caught between said locomotive tender and tank attached thereto and said water tank and base or substructure thereof, and was thereby, and before he could escape, caught between said tender and the said water tank, and crushed, bruised and wounded, and his collar-bones and other bones fractured and broken, and he was otherwise severely injured, whereby he became sick, sore, lame and disordered and disabled and deformed, and made to suffer great pain, and has ever since been crippled and in pain and in suffering, and disabled and deformed, and unable to perform manual labor, as he was prior to this injury, or to earn a livelihood, and will be so disabled and deformed and unable to earn a livelihood as long as he lives, because of said injury to him.

6

That to be properly and carefully constructed and located, said water tank and base or substructure thereof, and said side track, should have been constructed and located at least five feet from each other, and far enough apart and so constructed that there would have been not less than two feet between said water tank and base and substructure thereof and the side of any of said locomotives or tenders thereof when passing said water tank.

7

That this plaintiff did not by his own fault or carelessness or negligence in any manner contribute to his being so injured, and the same was wholly caused by the negligence and carelessness of said defendant and its servants, as hereinbefore stated. That this plaintiff is a young man in the prime of life, and immediately prior to his being injured, disabled, crippled and deformed as aforesaid was in good health, and able-bodied and without disability, and capable of earning a livelihood, and was, when so injured, earning not less than seventy-five dollars per month.

That by reason of the facts hereinbefore stated this plaintiff has been damaged in the sum of thirty thousand dollars.

Wherefore, he prays judgment herein for the sum of thirty thousand dollars, and his costs and disbursements herein.

J. L. MACDONALD,
Attorney for Plaintiff, Globe Building, St. Paul, Minn.

STATE OF MINNESOTA, }
County of Ramsey, } ss:

John Roberts, being first duly sworn, upon oath says, that he is the plaintiff in the foregoing within-entitled action; that he knows the contents of the foregoing complaint; that the same is true of his own knowledge, except as to matters therein stated on
8 information and belief, and as to such matters he believes it to be true.

JOHN ROBERTS.

Subscribed and sworn to before me this 13th day of October, 1890.

J. L. MACDONALD,
[NOTARIAL SEAL.] *Notary Public, Ramsey Co., Minn.*

Endorsed: Original. No. —. State of Minnesota, county of Scott. District court. John Roberts, plaintiff, against The Chicago, St. Paul, Minneapolis and Omaha Railway Company, defendant. Summons and complaint. Filed Nov. 5, 1890. Julius A. Coller, clerk. J. L. Macdonald, attorney for plaintiff, Globe building, St. Paul, Minn.

Petition for Removal.

(Title of Cause.)

To the honorable the district court for said county of Scott:

Your petitioner, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, respectfully shows to this court—

That the above-entitled action has been brought, and is now pending, in the court aforesaid, by the plaintiff above named against your petitioner as sole defendant therein, to recover from your petitioner alleged damages for alleged carelessness, negligence and unskillfulness in the construction and location of certain struct-
9 ures and tracks of its railway, and other negligence, and that said action is wholly of a civil nature; that the matter and

amount in dispute in said action and suit exceeds, exclusive of interests and costs, the sum of value of two thousand dollars, all of which will more fully appear by the complaint in said action, to which reference is hereby made, and which is hereby made a part hereof.

That the controversy in said action and suit is wholly between citizens of different States, and that your petitioner, the defendant therein, is a foreign corporation, and was at the time of the commencement of this suit, ever since — been, and still is a non-resident of the State of Minnesota, and was at said time, ever since has been, and still is, a corporation, duly created, organized and existing under and by virtue of the laws of the State of Wisconsin, and that it at all said times was, and is now, a citizen of the State of Wisconsin, having its principal office and place of business in the city of Hudson, in the State last named; that the plaintiff, John Roberts, prior to the commencement of said action and suit was, ever since has been, and still is, a citizen of the State of Minnesota, and did and still does, reside in and was, and still is, an inhabitant of, the district of Minnesota, within which district is the county of Scott, the county in which the said action and suit was brought, and is now pending; that the time within which the defendant is required by the laws of the State of Minnesota, and the rules of said district court of the county of Scott, in the said eighth judicial district, to answer or plead to the complaint in said action has not expired.

That your petitioner has made, and herewith files, a bond, with good and sufficient sureties, for its entering in the circuit court of the United States for the district of Minnesota, third division, on the first day of its next session, a copy of the record in said action and suit, and for paying all costs that may be awarded by the said circuit court, if the said circuit court shall hold that the said suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays the court to accept this petition and said bond, and to proceed no further in said suit.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
By E. W. WINTER, *General Manager.*

J. H. HOWE,
S. L. PERRIN,
Attorneys for Petitioner.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

E. W. Winter, being duly sworn, says, that he is an officer, to wit, the general manager, of The Chicago, St. Paul, Minneapolis & Omaha Railway Company, the corporation petitioner above named; that he has read the foregoing petition, and knows the contents thereof, and that the same, and all statements and allegations therein, are true.

E. W. WINTER.

11 Subscribed and sworn to before me this 31st day of October, A. D. 1890.

S. L. PERRIN,
[SEAL.] *Notary Public, Ramsey County, Minnesota.*

Endorsed: Filed Nov. 1, 1890.

Bond on Removal.

(Title of Cause.)

Know all men by these presents, that we, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, as principal, and E. W. Winter and Chas. W. Johnson, of St. Paul, Minnesota, as sureties, are held and firmly bound unto John Roberts in the penal sum of two hundred and fifty dollars, lawful money of the United States of America, the payment of which said sum well and truly to be made unto the said John Roberts, his heirs and assigns, the above-bounden principal hereby binds itself, its successors and assigns, and the said sureties hereby bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of October, A. D. 1890.

The condition of the above obligation is such that, whereas, a certain suit was brought on or about the 15th day of October, A. D. 1890, in the district court for the county of Scott, in the eighth judicial district of the State of Minnesota, by the said John Roberts against the above-bounden principal, The Chicago, St. Paul,
12 Minneapolis and Omaha Railway Company, and the said suit is now pending in the court aforesaid, and is removable into the circuit court of the United States for the district of Minnesota, third division, and the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, the sole defendant in said suit, intends to file its petition in the said district court praying for the removal of said suit from said district court to the said circuit court:

Now therefore, if the said petitioner, The Chicago, St. Paul, Minneapolis & Omaha Railway Company, shall enter in the said circuit court of the United States for the district of Minnesota, third division, on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court of the United States, if said circuit court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
By E. W. WINTER, *General Manager.*
E. W. WINTER. [SEAL.]
CHAS. W. JOHNSON. [SEAL.]

Signed, sealed, and delivered in the presence of—
S. L. PERRIN.
H. P. BARLOW.

13 STATE OF MINNESOTA, } ss:
County of Ramsey, }

E. W. Winter, to me known to be the general manager of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, the principal named in the foregoing bond, and to me known to be the person who executed the same, came personally before me this 31st day of October, A. D. 1890, and acknowledged the execution of the foregoing instrument to be his free act and deed, and the free act and deed of the said principal. Also came personally before me the said E. W. Winter and Chas. W. Johnson, to me well known to be the persons who executed the foregoing bond as sureties, and each acknowledged the same to be his free act and deed.

S. L. PERRIN,
[SEAL.] *Notary Public, Ramsey County, Minn.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

E. W. Winter and Chas. W. Johnson, being first duly sworn, doth say, each for himself, that he is one of the persons who signed the foregoing bond as surety; that he is a resident and freeholder of the State of Minnesota, and that he is worth the sum of five hundred dollars above his debts and liabilities, and exclusive of property exempt from sale on execution.

E. W. WINTER.
CHAS. W. JOHNSON.

14 Subscribed and sworn to before me this 31st day of October, A. D. 1890.

[SEAL.] S. L. PERRIN,
Notary Public, Ramsey County, Minn.

Endorsed: Filed Nov. 1, 1890.

Affidavit of Default.

(Title of Cause.)

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Personally appeared J. L. Macdonald, who, being first duly sworn, deposes on oath and says:

That he is the attorney for said plaintiff in the above-entitled action and has been such attorney since the commencement thereof. That the summons and complaint in said action were served upon said defendant, The Chicago, St. Paul, Minneapolis & Omaha Railway Company, on the 15th day of October, A. D. 1890, at the city of Shakopee, in said county of Scott, by the sheriff of said county of Scott, by then and there delivering to the duly authorized and acting freight and ticket agent of said defendant at and in said city of Shakopee in said county of Scott, a true and correct copy of said

summons and complaint herein, as will more fully appear
15 by reference to the return of said sheriff upon and attached to said summons and complaint herein.

That said defendant has not answered or demurred to said complaint and has not appeared in said action in any manner and is wholly in default therein; and that more than twenty days have expired since the service of the summons and complaint herein upon said defendant, as aforesaid.

That this action is brought for the purpose of recovering damages, for injuries inflicted upon said plaintiff by said defendant, through and because of the carelessness of said defendant and its agents and servants, during the year 1890, as is more fully stated and alleged in said complaint herein, which is hereby made a part hereof; and that it is necessary before judgment can be rendered herein for said plaintiff, that the amount of plaintiff's damages, which this action is sought to recover, be ascertained by said court, or under its direction.

Wherefore this deponent, on behalf of said plaintiff, and as his attorney herein, prays that said damages be ascertained by said court, or under its direction, by a reference of said action to some person, which referee may be authorized to report a judgment herein.

J. L. MACDONALD.

Subscribed and sworn to before me, this 6th day of November, A. D. 1890.

WARREN H. MEAD,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minn.*

(Endorsed:) Original. No. —. State of Minnesota, county
16 of Scott, district court. John Roberts, plaintiff, against The Chicago, St. Paul, Minneapolis & Omaha Railway Company, defendant. Affidavit of default and order of reference. Filed Dec. 5, 1890. Julius A. Coller, clerk. J. L. Macdonald, attorney for plaintiff, Globe building, St. Paul, Minn.

Order of Reference.

(Title of Cause.)

Upon reading the affidavit of John L. Macdonald, attorney for said plaintiff herein, which is hereto annexed, and it appearing that the summons and complaint were duly served upon said defendant more than twenty days prior to this date, and that said defendant has not answered or demurred to plaintiff's complaint herein, and has not appeared in said action in any manner, and is wholly in default, and said plaintiff is entitled to have the damages claimed by him in the complaint herein ascertained by the court, or under its direction, now, therefore, it is ordered, that said action be, and the same hereby is referred to John L. Townley, Esq., to hear, try and determine the same and to report and order a judgment herein; that he is hereby appointed sole referee herein for that purpose.

Ordered further, that upon the filing of the report of said
17 referee, judgment be entered herein by the clerk of said court in accordance with said report and order for judgment of said referee.

Dated November 7, A. D., 1890.

By the Court:

JAMES C. EDSON,
Judge Eighth District.

(Endorsed:) Filed Dec. 5th, 1890, Julius A. Coller, clerk.

Oath of Reference.

(Title of Cause.)

STATE OF MINNESOTA, } ss:
County of Scott, }

I, John L. Townley, do solemnly swear that I will faithfully and fairly hear and examine this action, wherein John Roberts is plaintiff and The Chicago, St. Paul, Minneapolis & Omaha Railway Company is defendant, and make a true and just report thereon, according to the best of my understanding and ability so help me God.

JOHN L. TOWNLEY.

Subscribed and sworn to before me this 20th day of November, A. D., 1890.

[NOTARIAL SEAL.] J. L. MACDONALD,
Notary Public, Ramsey County, Minn.

(Endorsed:) Filed Dec. 5, 1890. Julius A. Coller, clerk.

18 *Referee's Report.*

(Title of Cause.)

The following are the minutes of the testimony taken before me as referee upon the hearing and trial of the above-entitled action.

JOHN L. TOWNLEY, *Referee.*

Dr. E. W. MCCORD, being first duly sworn by me, testified as follows:

I know the plaintiff in this case. I live in this city, city of St. Paul, on Colburn street; my office is No. 963 West Seventh street in St. Paul. I am a practicing physician and surgeon, and have been in practice about thirteen years in all, and for the past six years in this city, St. Paul. I first became acquainted with plaintiff about three years ago. At that time I attended his wife in confinement and child-birth, and I have known him ever since that time. I remember of his injury, but I was absent from the city at the time he was injured; at the time of the accident. Some time after his in-

jury he came to see me about it. I was a physician for a local branch of "Iron Hall," an organization that he was a member of. He was entitled to and received four weeks' pay for his injury, at twenty-five dollars per week, and he applied for four weeks' more benefit, which was rejected, because of the report made on it by Dr. J. H. Murphy, of St. Paul, who had attended Mr. Roberts, the plaintiff, for the injury. Dr. J. H. Murphy is the physician for
19 the Chicago, St. Paul, Minneapolis & Omaha R'y Co. at St. Paul. This is the railroad that Mr. Roberts was employed with.

At this time, in July, 1890, I examined Mr. Roberts as to the extent of his injury and disability, and decided and so reported to the grand medical director of the "Iron Hall" order that he was entitled to four weeks' more benefit and allowance of twenty-five dollars per week on account of injury and disability which he was then laboring under. This organization, the order of Iron Hall, has a rule that requires claims of sickness or injury to be reported on every four weeks. Mr. Roberts was allowed, on my report so made, the further sum of twenty-five dollars per week for four more weeks. At this time of making this report I examined him, and found that there had been a fracture of the right clavicle; one fragment of the bone was overriding the other; the ends of the bones were not in opposition, and had knit and grown together in that way. The left clavicle had also been fractured, but was grown and united together fairly well; and I found that the right shoulder had been dislocated, with a rupture of some of the ligaments; and there appeared to be a pressure on the nerves in the axillary space, producing numbness in the arm, with almost absolutely no motion, or power of motion, in the right arm. His right arm and hand were very cold, because the circulation in this arm and hand was very poor. He carried his right arm in a sling or support then, and afterwards. At that time he was totally unable to perform any work or manual labor.

20 During all the time I have known Mr. Roberts, the plaintiff, he has been a sober, honest, faithful man, and at all times industrious.

EUGENE W. McCORD, M. D.

FRANK ERLING, being by me duly sworn, testified as follows:

I am acquainted with the plaintiff, Mr. John Roberts, and have known him for three years or thereabouts. I know him to be a sober, careful, and honest man and very industrious until he was hurt this spring. This was his general reputation, too. He was not a drinking man. He was not a lazy man. I never saw him under the influence of liquor. I live in this city of St. Paul, and kept a shoe store at No. 1019 & 1033 West Seventh street in the city. I have a boot and shoe store at present at No. 456 St. Peter street in St. Paul.

FRANK ERLING.

Minneapolis, Minn., November 21st, 1890, at 8 p. m., the examination resumed, pursuant to adjournment.

Dr. JAMES H. DUNN, being first by me duly sworn, testifies as follows:

I reside in Minneapolis, and am by profession a practicing physician and surgeon, and am now in practice at No. 24 South Fourth street in said Minneapolis, and am one of the professors of the medical department of university of the State of Minnesota. Last year I was president of State medical society.

21 I have an extensive practice in surgery. I have been so practicing in Minneapolis for the past six years, and was in the practice for six years before coming here. I am thirty-seven years of age. I know John Roberts, the plaintiff in this suit. I have examined him. I first examined him Aug. 28th, 1890, and then found him injured. I found he had a dislocation of the outer end of the right clavicle; it was an old dislocation unreduced. The result of this is that the outer end of the clavicle bone, *i. e.* right clavicle bone, projects upwards and backwards nearly an inch from its natural position on the shoulder, and presses very sharply on the skin, which was reddened and inflamed as a result of such pressure. The clavicle being the support to the shoulder, and being in this manner torn away from its proper articulation and position, the shoulder is thereby allowed to fall downwards and forwards about an inch from its normal position. The result of this malposition of the shoulder are twofold: First, great loss of power of the right arm, particularly in all actions requiring muscular actions from the shoulder cord. It will naturally give rise to pain by pressure upon the large plexus of nerves which pass through the axilla, *i. e.* the armpit.

All the nerves supplying the upper extremity pass through this region, and the displacement of the head of the bone, such as exists in this case, must of necessity compress and irritate some of these nerves. The injury will be permanent, for the reason that without surgical interference which will replace and retain the dislocated clavicle, there could be no improvement, and, so far as my experience goes, surgical interference rarely, if ever, is successful.

22 In my opinion he cannot be cured, and he cannot be helped at all without he is cured. As the injury now stands I consider it permanent. I examined him and saw him today, and his physical condition today is precisely as it was on August 28th, 1890. It absolutely and certainly prevents him from the use of his arm. He can use his fingers. I have seen such cases where good surgery required the cutting the nerves to prevent pain. The extent of the pain is an uncertain factor, but in cases of this kind is almost always great and enough to prevent the use of the arm. I mean to say we can determine the amount or degree of disability from loss of muscular power. In this case he cannot do heavy work of any kind. The further disability is measured by the pain, and if arm movement makes it painful, why, he cannot do anything with his arm. As

near as I can tell, and in my opinion, he has a great deal of pain in the arm and shoulder.

JAMES H. DUNN, M. D.

Examination continued until Nov. 22nd, 1890, at 10 o'clock a. m., to be resumed at my office.

JOHN L. TOWNLEY, *Referee.*

ST. PAUL, *Nov. 22d*, 1890—10 a. m.

This examination continued until Nov. 29, 1890, at 2 p. m., to be resumed at my office.

JOHN L. TOWNLEY, *Referee.*

JOHN ROBERTS, plaintiff, being by me duly sworn, testified as follows:

23 I am the plaintiff in this suit. The last time I did any work it was for The Chicago, St. Paul, Minneapolis and Omaha Railway Company, defendant herein. I stopped working for this company the seventh day of March, 1890. The reason that I quit working for this company at that time was because I got hurt, and it injured and disabled me so I could not work any more. I was then working in the capacity of fireman on a locomotive, running between St. Paul and St. James, hauling freight trains. I got hurt in the morning of that day, at the village of St. James, in this State. We got to St. James the night before from St. Paul with a freight train, and put up then for the night. The next morning the engine was brought out of the round-house, and run on the turn-table and turned around. This was the morning of March 7th, 1890. It, the engine, was then run onto the side track leading from the turn-table to main track, and stopped on the side track. The engineer and I then got aboard and waited for orders to move the engine on the main track and take a train of freight cars to St. Paul, Minnesota. While waiting there I was doing my work, and all required of me, such as wiping up and firing, and getting oil, and whatever was necessary for me to do. While so performing my duty I stepped out of the cab of the locomotive and went back to the box in the tender where the "waste" was kept, to enable me to get waste to use in cleaning the engine. In getting this waste I had to step on the rim of the tender, and hold onto the upper edge of the side of the tender with my left hand, and open the box and reach in and take the waste out with my right hand. While I was
24 so getting this waste the engineer had the engine in motion and before I got back to the cab, and just as I got the waste in my hand, I was caught between that tender and the base of the water tank, which stands there very close to this side track, and near its junction with the main track. I was struck and caught between the tank and the upper rim or edge of the tender, and crushed in between the two. When I was so caught between the tender and tank, the tender being in motion rolled and turned me around, so that my right shoulder was crushed in and bruised between the

upper part of the tender and the water tank, and I was so held fast in this way and crushed and bruised, and my bones broken, my right arm and shoulder and body injured, and my whole breast and side badly hurt and injured. This crushed and squeezed position and injury rendered me unconscious, and I remember nothing after being so caught until I afterwards recovered consciousness and found myself lying on the ground beside the track at the foot of the water tank, where I had fallen insensible. From there I was carried to the pump-house. I was afterwards taken to the hotel at St. James. When I came to my senses on the ground, where I had fallen, and from that time on, and for as much as four weeks thereafter intervened before I could use my left hand. I was four weeks before I could turn in the bed. I could not use my right arm at all for anything until June, and then only to write a little. It was perfectly and absolutely helpless until in July, 1890, and since then I have only been able to use it in writing, and eating my meals; and in lifting light articles. My
25 right arm is now so weak, and has not been strong enough to do any kind of work since it was hurt. I cannot even pump a pail of water with my right arm. If I go to pick up or lift any article my shoulder will snap and pain. I cannot lift a can of oil, a gallon. I was obliged to lay in the hotel at St. James, Minnesota, for four weeks and two days before I could be moved to my home, or moved at all. My wife came up there and helped nurse me and care for me. She had a man to assist her. This man was in attendance night and day. I suffered great and severe pain all the time I was at St. James. It was constant and severe, night and day. I could not hardly stand it. This pain was in my breast and side and shoulder and arms, and all over me. I could not be moved while I was in bed at St. James until the last few days. I suffered intense pain all the time then, and when I was being brought home on the cars, and during the whole summer and fall, and am not free from pain yet. I suffer much with my shoulder and side. My shoulder gives out. It will not carry my arm. When I walk considerable it pains me. I cannot do any kind of labor to support myself and family since this accident. I have no profession, and have to depend on my labor for my support. I am twenty-nine years of age. My wife is thirty-two years of age. Before I was hurt I was in good health, and could do all kinds of hard labor. I had no disease or disability of any kind. I commenced working for this company October 25th, 1887, and was with them all the time until I was hurt this spring, March 7th, 1890. I had only been
26 firing on the road since December, 189-. I think the 10th. I was not a regular fireman on that route. I was what was termed an extra; that is, I did not have a regular or particular engine to work on. At the time I was injured I was earning from seventy to eighty dollars per month; my average was seventy-five dollars per month. I have not been able to earn a cent since I was injured. My wife is earning by sewing all that we now have, except the benefits of insurance, &c. I have paid or incurred expenses at St. James, $106, and since my return home my wife has cared for

and nursed me. I have many little expenses which I have no account of. I can now take care of myself, but cannot work. At and before I was injured it took about forty dollars per month to support myself and wife. I had been married about three years, and had furnished my house and fixed up to enable us to live comfortable at that time, and all over forty dollars per month we saved and put away. I could save thirty-five dollars per month in this work. I understand that when a man has fired four or five years he is in line of promotion, provided he is a faithful and careful man. In two or three years more I could have become so thoroughly familiar with the work that I could have handled an engine and been worth more money. I believe I was in good standing when I was injured, and would then be in regular line of promotion to a position of engineer on this road, for this company. I never had any fault found with me when I was with this company; that is, no fault found, and nothing was ever said to me. When I began working for this company, in 1887, I received only
27 one dollar and twenty-five cents per day. My wages was raised from then at different times until I was hurt this spring. (Plat Exhibit A hereto attached shown witness.) This plat shows about the relative position of the turn-table mentioned, side track leading from it to the main track, and the main track and the water tank, and depot buildings of the defendant railroad company. The distance from the inside rail of the side track on which the locomotive and tender were that I got hurt on to the nearest corner of the base of the water tank, and at the point where I was hurt, is twenty-seven inches, and the side of the tender extended out over that rail towards the water tank twenty inches, leaving only seven inches of space between the bottom of the tender and the water-tank base; and at that point that rail of the side track is lower than the outside rail, and thereby caused the top of the tender to lean in towards the base of the water tank, and make the distance between the two at the top of the tender above five inches. The distance from nearest rail of the main track to the water tank was then six feet. These distances were obtained by me from actual measurement made by me. I know these distances to be correct. I know how railroad tracks are located with reference to water tanks generally, and I also know how they should be located respectively. The nearest rail to the water tank should be six feet; not less than that. All tracks should be located far enough from water tanks or buildings, or other like obstructions, so that there would be at least two and one-half feet from the
28 side of the locomotives or tenders to the nearest part, portion or point of said obstacles, and if that had been the case here I would not have been injured. I did not know before I was injured that this side track was so near the base of the water tank. I was on the engine a few times before this when it passed this point on the side track, and on such occasions it was nearly always in the night-time, and always when I did so come out over this side track before that I was in the cab of the locomotive, attending to my duties, and thus prevented from seeing the relative positions, or

nearness of the water tank and tender. I did not know that there was any danger of my being so caught and injured when I stepped out to get the waste, and, as before stated, if the tank had been at a proper distance from the side track I would not have been hurt or injured at this time. I at all times was careful in working about the engine. I have observed the distance that water tanks are located from the nearest track to them, upon this and other railroads, and I have not seen any that was not at least six feet from the nearest rail, on the track passing them. I have examined all the water tanks on defendant's track between St. Paul and St. James, and the tracks nearest to them, with a view of ascertaining and learning the distance from each water tank to the nearest track and found them all to be not less than six feet apart, except at the place where I was hurt. In so placing that side track and water tank so near together this company, the defendant, was guilty of carelessness and negligence, and that was the sole cause of my injury, and the injury was not caused through any negligence of mine
29 This water tank and side track, to have been carefully and properly located, should have been at least five feet apart; that is, the rail nearest the tank should have been five feet from it.

This railroad that I was fireman upon, and that this side track and water tank is a part of, is what was formerly called and known as the St. Paul & Sioux City railroad, and it is now owned and operated by The Chicago, St. Paul, Minneapolis & Omaha Railway Company, defendant; that is, that company is operating it, and claims to own it, and has its name on the cars and other property of the company, and it advertises itself to be the owner and operator of it, and to be a railroad corporation organized under the laws of the State of Wisconsin.

At this time the hearing and examination was continued until ten o'clock a. m., on Nov. 21st, 1890.

Cause so continued.

JOHN L. TOWNLEY, *Referee.*

Nov. 21, 1890—10 o'clock a. m.

Cause and examination resumed.

JOHN ROBERTS' examination continued by his attorney as follows:

My recollection is, that the wages of engineers is at two and one-half cents per mile, and it averages about one hundred dollars per month. This is for the first year's work, and for the second year their monthly average is about one hundred and ten dollars per month, and for third year and afterwards they average about one hundred and twenty dollars per month. This depends on
30 their runs. I can read and write, and have education sufficient to perform any duties such as an engineer. I expected to follow railroading for a life business. It had become my business. If I had not been injured I could have earned my living, and

made some money besides, in many other pursuits in life. I like mechanics and machinery, or any other employment, and before being injured was able to earn my living and money besides, at other occupations. I believe from my physical condition and pain, and from the fact that I cannot get well, or sound and strong, and from what the doctor tells me, I am sure I cannot ever again do any kind of hard work, or any work of any kind that will pay, and that I must suffer all the time, and be forever permanently disabled and kept from working and supporting my family and myself, and from making and saving any money, and will always have pain on account of this injury. I do not think I can do any more manual labor, or railroad work as fireman or engineer, or other labor or work at all. I cannot work now. Yes, I think it was necessary for me to go out and get the waste at the time and in the manner that I did. I had to get it from this place in this way. I had no waste in the cab or on the engine, and then needed it to wipe off the locomotive at that time, and so went to get it. When I got the waste I was strictly in the line of my duty, at work for the company, as we were just about to start, and I had to clean off the engine, or parts of it. It was my duty to clean off the engine every morning before starting from St. James, and I had to get the waste
31 from this box. This box was kept on the tender. This was my second or third trip on this engine, and this box from which I took the waste was then in the same place that it was when I began work on this locomotive. As a general rule all the engines of defendant have this box in the same place as this one was; that is, the same place on the tender, and this is the usual and proper way that I or any fireman can get it out to use in cleaning up. There are nine water tanks between St. Paul and St. James besides the one at St. James.

JOHN ROBERTS.

November 21st, 1890.

Examination continued and adjourned until 8 p. m. of this date.

JOHN L. TOWNLEY, *Referee.*

ST. PAUL, MINN., *Nov.* 29, 1890—2 p. m.

Examination resumed pursuant to adjournment.

JOHN J. HAMILTON, being first duly sworn by me, testified as follows:

I live in St. Paul, Minn.; I am manager for southern Minnesota for Mutual Reserve Fund Life Association of New York; I have been in life insurance business for upwards of seven years, and off and on for the past seventeen years. In my business, and in all life insurance associations and companies, we use tables of mortality; we use the American experience table of mortality and expectation of life; other companies use other tables, and this one too.
32 The difference between all tables is very slight and consists of fractional percentages. In my opinion and experience,

and according to the American experience table and other tables, the expectation of life for a man at the age of twenty-nine years, who is healthful and of good habits, and who can pass a good examination, is thirty-six and a fraction added years thereafter, and in the same way his probable life is about thirty-nine years. This will be shown by the tables which I now present to you. I refer to page 14 of this book.

J. J. HAMILTON.

JOHN L. MACDONALD, being first by me duly sworn, testified as follows:

I now live in St. Paul, Minnesota, and have lived in Minnesota for the past thirty years and upwards. I know the railroad of the defendant, running from St. Paul via and through the village of St. James, Watonwan county, Minnesota, to Sioux City, in the State of Iowa, the same being the railroad which the plaintiff testified to herein that he was injured upon. That railroad is the only railroad passing or running through the village of St. James aforesaid, and that portion of it which extends from St. Paul to and through St. James and to the State line of Iowa was known as the St. Paul & Sioux City railroad, before it was acquired by the defendant herein, and for more than one year last past I know it to have been used and operated by the defendant for the transportation of freight and passengers for hire. Since it has been acquired by the de-
33 fendant it is known as a portion of the Western division of the Chicago, St. Paul, Minneapolis & Omaha railway of defendant.

J. L. MACDONALD.

At this time plaintiff's attorney offers in evidence, for the purposes of this case, chapter 219, Special Laws of Minnesota for the Year 1881, the same being a special act, entitled "An act to authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company to acquire, construct, maintain and operate railroads in the State of Minnesota." This act was approved February 11, 1881.

Plaintiff's attorney also presented and offered in evidence, for the purpose of this case, chapter 228, Special Laws of Minnesota for the Year 1881, the same being a special act, entitled "An act to authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company to purchase, own and operate the St. Paul & Sioux City railroad and its proprietary or connecting roads, and to issue stock and bonds thereon." This act was approved February 11, 1881.

Plaintiff's attorney also offers in evidence in this case, chapter 362 of the Special Laws of Minnesota for the Year 1881, the same being a special law, entitled "An act to confer upon the Chicago, St. Paul, Minneapolis & Omaha Railway Company the rights, powers, franchises, privileges and immunities within the State of Minnesota heretofore conferred upon the Chicago, St. Paul & Minneapolis and West Wisconsin Railway Companies, and to declare the Chicago, St.

Paul, Minneapolis & Omaha Railway Company the successor,
34 in the State of Minnesota, of the Chicago, St. Paul & Minneapolis and West Wisconsin Railway Companies." This act was also approved February 11, 1881.

All of said acts were received in said cause.

After the offers and reception of the above and foregoing special laws the plaintiff, by his attorney, offers in evidence a certified copy of certain resolutions made and adopted by The Chicago, St. Paul, Minneapolis & Omaha Railway Company, the defendant, and passed at a meeting of the officers of the said company, the defendant herein, at a meeting of the board of directors of the said railway company, duly called and held in the city of New York, on the 21st day of April, 1881, and duly signed by the secretary of said company, on May 10, 1881, with the corporate seal of said company affixed. Said offer was made and said resolutions were received in said cause for the purpose, among others, of showing that said defendant thereby accepted all the three acts of the legislature above referred to, and therein named and specified, together with all the terms, conditions and provisos in said acts and legislation contained. And a copy of the said resolution of acceptance, duly certified by the secretary of state, are hereto attached and marked Exhibit "B."

Plaintiff, for the stated purpose of submitting to the referee any and all later special laws which have reference to the chartering and authorizing said defendant to acquire, own and operate railroads in the State of Minnesota, offers in evidence chapter 301 of the Special Laws of Minnesota for the Year 1887, which act purports to condi-
tionally repeal chapter 228 of the Special Laws of the State of
35 Minnesota for the Year 1881, the same being one of the acts mentioned in the above resolution of acceptance by defendant. Received in evidence herein.

During the trial and examination the plaintiff showed and exhibited to me, the referee, his shoulders and injured portions of his body—injured in the accident set forth in the complaint—and explained wherein he was injured. And in the examination of Dr. James H. Dunn, with a chart in court, the bones claimed to be injured and broken, and the injuries complained of and alleged in the complaint to have resulted and to have been caused by said accident were more fully explained by the use of said chart, together with the appearance of said injured portions of plaintiff's body. The deformed appearance of plaintiff's body is substantially as described in his complaint.

Testimony closed on November 29th, 1890, at 6 p. m.

JOHN L. TOWNLEY, *Referee.*

Referee's Findings.

The undersigned, appointed by the court sole referee herein, to hear, try and determine said action, and to report and order a judgment thereon, finds and reports as follows:

Said plaintiff appeared before the undersigned in person and by

attorney and called witnesses and gave evidence therein, as will more fully appear by my minutes of said evidence and testimony filed therewith.

36 After considering the allegations and proofs herein, I find the facts to be as follows:

First. That said defendant is a corporation duly organized as alleged in plaintiff's complaint herein, and that it was duly authorized by the laws of the State of Minnesota, and more particularly those described in the preamble and resolution of acceptance thereof by defendant, hereinafter mentioned, to wit: An act entitled "An act to confer upon the Chicago, St. Paul, Minneapolis & Omaha Railway Company the rights, powers, franchises, privileges and immunities within the State of Minnesota, heretofore conferred upon the Chicago, St. Paul & Minneapolis and West Wisconsin Railway Companies, and to declare the Chicago, St. Paul, Minneapolis & Omaha Railway Company the successors in the State of Minnesota of the Chicago, St. Paul & Minneapolis and West Wisconsin Railway Companies, approved February 11, 1881 (the same being chapter 362 of the Special Laws of the State of Minnesota for the Year 1881), and an act entitled "An act to authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company to purchase, own and operate the St. Paul & Sioux City railroad, and its proprietary or connecting roads, and to issue stock and bonds thereon." Approved February 11, 1881 (the same being chapter 228 of the Special Laws of said State of Minnesota for the Year 1881), an act entitled "An act to authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company, to acquire, construct, maintain and operate railroads in the State of Minnesota, approved February 11, 1881" (the

37 same being chapter 219 of the Special Laws of said State of Minnesota, for the Year A. D. 1881), to acquire, own and operate the railroads named and mentioned in said complaint, together with the tracks, rolling stock, cars and locomotives, water tanks and other appliances thereunto belonging.

Second. That at a meeting of the board of directors of said Chicago, St. Paul, Minneapolis & Omaha Railway Company, defendant herein, duly called and held on the 21st day of April, 1881, the said board of directors then and there duly authorized so to do, did, by preamble and resolution then and there duly adopted, accept the several acts of the legislature of the State of Minnesota therein mentioned, including said chapter 219 of the Special Laws of the said State of Minnesota, for the Year A. D., 1881, and that said defendant did thereafter and on the 10th day of May, 1881, duly file with the secretary of state of the said State of Minnesota a duly authenticated copy of said preamble and resolutions of acceptance, duly certified to by the secretary thereof, and the same was duly authenticated by the corporate seal of said defendant, a certified copy of which said preamble and resolution of acceptance is also attached to my minutes of testimony, and is also made a part hereof.

Third. That said defendant was by said laws of Minnesota, and particularly said act entitled "An act to authorize the Chicago, St.

Paul, Minneapolis and Omaha Railway Company to acquire, construct, maintain and operate railroads in the State of Minnesota," (a copy of which said act is hereto attached) being said chapter
38 219, of the Special Laws of said State, authorized to acquire, construct, maintain and operate the railroads herein mentioned and referred to, upon the express condition and provision contained in said chapter 219 and duly accepted and agreed to by said defendant as herein stated "that in all suits and proceedings upon causes of action arising in this State, in which the said Chicago, St. Paul, Minneapolis and Omaha Railway Company shall be a party, shall be deemed to be for all purposes a domestic corporation and not otherwise"—and by said act last mentioned, and said acceptance thereof, as herein stated, the said defendant then became, and ever since has been, in all suits and proceedings, upon causes of action arising in this State in which it was or is a party including this action, for all purposes a domestic corporation and not otherwise.

Fourth. That under and pursuant to the laws of said State of Minnesota and especially those mentioned in said preamble and resolution, and particularly said act entitled "An act authorizing the Chicago, St. Paul, Minneapolis and Omaha Railway Company to acquire, construct, maintain and operate railroads in the State of Minnesota," approved February 11, A. D. 1881, being said chapter 219 of the Special Laws for the Year A. D. 1881, the same being one of the three acts mentioned in said preamble and resolution of acceptance; and under and pursuant to the said acceptance of said laws of said State of Minnesota, the said defendant did acquire, own, construct and operate the railroads mentioned in plaintiff's complaint herein; and has ever since the said year A. D. 1881, and
39 now does own and operate said railroads, and particularly that certain railroad located and extending from the city of St. Paul in said State to and through the village of St. James therein, and to Sioux City in the State of Iowa, which said railroad was formerly named and known as the St. Paul and Sioux City railroad and which was on March 7th, 1890, and is now, known as a part of the Western division of the said Chicago, St. Paul, Minneapolis and Omaha Railroad Company of said defendant, together with the tracks, rolling stock, cars and locomotives, water tanks and other appliances thereunto belonging, and that it has ever since operated said railroad and is and was a carrier of freight and passengers thereon for hire, as alleged and stated in the said complaint.

Fifth. That in the operation of said railroads it became the duty of said defendant to procure, and have in use good, safe and properly constructed and located railroads and tracks and side tracks, water tanks, locomotives, machinery and other appliances and apparatus, and to operate the same in a good, safe, careful and proper manner for the safety of all persons.

Sixth. That on the 7th day of March, A. D. 1890, the plaintiff herein was in the service and employment of the defendant above named, as a fireman upon one of its said locomotives as stated in the complaint.

Seventh. That in and at St. James, there is owned and operated by defendant, as a part of its railway, a turn-table and a side track leading thereto, from the main line and track of said railroad, and a water tank situate thereat as hereinafter stated; that
40 said water tank is used by said defendant to supply its locomotives with water, while being used on its said railroad, and that said side track leading from said turn-table to the main track, and said water tank were and are constructed and located so that the nearest or inside rail of said side track was twenty-seven inches from the nearest part to corner of the base of said water tank; and the distance from the nearest rail of the main track of said railroad on the main line, to said water tank is and was about six feet.

Eighth. That the side of the tender of the locomotive herein referred to, and upon which the plaintiff was, extended out and beyond the rail of said side track towards the said water tank and its base or substructure, when passing the same twenty inches, leaving a space of only seven inches between the side of the said tender and the base or substructure of said water tank; and that the upper edge or rim of said tender projected still farther outwards and thereby reduced the said space to about, and not exceeding five inches between the upper edge or rim, of said tender and base or substructure of said water tank, when it, the tender, was passing the same on said side tracks.

Ninth. That the said side track and water tank were improperly and unsafely located and constructed relative to each other, and were located and constructed too close and near to each other, thereby making them unsafe and dangerous to plaintiff and others; that the same should have been located and constructed sufficiently far apart, so as to allow the plaintiff or any person or per-
41 sons employed by defendant to, in the performance of his or their duty, as engineer or fireman thereon, step out upon the outside of the tender of the locomotives of defendant, and particularly the one on which the plaintiff was engaged and employed on as herein stated, with safety, and without being hindered and obstructed, or caught between the same and crushed, bruised or wounded or otherwise injured; and that in so locating and constructing and building said side track and water tank so near together and so near to each other, said defendant has been careless, negligent and unskillful, and in default in the proper performance of its duty in the constructing, operation, and management of its said railroad, substantially as alleged in the complaint, and has in consequence thereof, and on account of such faulty, negligent and careless construction of said side track and said water tank injured the plaintiff as alleged in the complaint.

Tenth. That plaintiff at the time alleged in the complaint, was (and at the time he was injured as therein stated) engaged in the necessary and proper performance of his duty as a fireman upon defendant's engine and tender; and that, without any fault or carelessness or negligence on his part, he was caught and drawn in between the corner of said water tank, or the substructure thereof, and the tender upon which he was working, and had his bones crushed

and broken, and fractured, and was otherwise crushed, squeezed and bruised and severely and permanently injured. That on account of the injuries so then received, he has been made to, and has suffered great bodily pain, and that he now on account
42 thereof, suffers great bodily pain and mental anguish and distress.

That when so injured plaintiff was of the age of twenty-nine years, and was in good health and possessed a robust and strong body and was a person of temperate and industrious habits, and was then earning and capable of earning about and from seventy to eighty dollars per month, and had a reasonable prospect of earning more in the near future, had he not been so injured.

That he is now unable to perform manual labor of any kind. That his injuries, so then received are serious, severe and permanent. That on account thereof plaintiff will hereafter be unable to earn a livelihood, or to support himself, or his family, by manual labor because of said injury. That he has expended considerable sums of money in his faithful efforts to care said injuries, and relieve the pain attending afflictions caused by said accident; that he is now much deformed in body and in poor and feeble health, on account of said injuries so received as aforesaid to his great damage as hereinafter found and stated. That by reason of the carelessness and negligence of the defendant herein found, and as aforestated, the plaintiff has sustained damages in the sum and to the amount of twenty-one thousand dollars nine hundred five dollars ($21,905.00).

From the foregoing and as conclusion of law, I find that plaintiff is entitled to recover of said defendant, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, the sum of twenty-
43 one thousand nine hundred and five dollars ($21,905.00) together with his costs and disbursements herein.

Ordered that judgment be entered herein in favor of said plaintiff and against said defendant for said sum of twenty-one thousand nine hundred and five dollars ($21,905) and the costs and disbursements herein.

(Signed) JOHN L. TOWNLEY, *Referee.*

Dated December 4, 1890.

My fee for referee is ninety dollars ($90).

EXHIBIT "A."

Chapter 219: An act to authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company to acquire, construct, maintain, and operate railroads in the State of Minnesota.

Be it enacted by the legislature of the State of Minnesota:

SECTION 1. The Chicago, St. Paul, Minneapolis & Omaha Railway Company, (a corporation created and existing under the laws of the State of Wisconsin) its successors and assigns, is hereby authorized and empowered to locate, construct, maintain and operate in the State of Minnesota, and to lease, sell or encumber the same, any

railroad or railroads, which, when constructed, could be operated in connection with any railroads now or hereafter to be lawfully acquired, operated or controlled by said Chicago, St. Paul, Minneapolis and Omaha Railway Company, in said State, as an extension or branch thereof; and to that end, the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, its successors and assigns,
44 shall have and possess, and may exercise and enjoy, in addition to the powers, privileges and franchises specially conferred upon said company, all the rights, powers, franchises, privileges and immunities, including the powers of eminent domain, conferred by the laws of the State of Minnesota, upon railroad companies organized thereunder, and may also exercise throughout this State, in connection with any railroad now owned, controlled or operated by it, or which it may hereafter lawfully own, control or operate, the powers conferred upon the Chicago, St. Paul, & Minneapolis Railway Company, by chapter one hundred and eighty-three (183) of the Special Laws of Minnesota, of the year A. D. one thousand eight hundred and seventy-nine (1879), as to the counties therein named; and the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, its successors and assigns may acquire, by purchase, lease or otherwise, any railroad or railroads, or the stock or other security thereof, now constructed or hereafter to be constructed in the State of Minnesota, so situated with reference to any railroad now owned or hereafter to be acquired by said Chicago, St. Paul, Minneapolis & Omaha Railway Company, its successors or assigns, as to constitute an extension, branch or feeder thereof and which may be operated in connection therewith.

Provided, however, that nothing herein contained shall authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company, its successors or assigns, to acquire or control, by purchase or
45 otherwise any parallel and competing line of railroad within this State;

And provided further, that the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, its successors and assigns, shall in exercising the power of eminent domain by this act conferred, and in all proceedings and appeals therein, be taken and held in all courts and places to be a domestic corporation; and provided further, that all suits and proceedings upon causes of action arising in this State, in which the said Chicago, St. Paul, Minneapolis and Omaha Railway Company shall be a party, shall be deemed to be for all purposes a domestic corporation, and not otherwise.

SEC. 2. This act shall take effect and be in force from and after its passage.

Approved February 11, 1881.

(Endorsed:) State of Minnesota, district court, Scott county. John Roberts, pl'ff, against The Chicago, St. Paul, Minneapolis and Omaha Railway Company. Report of referee and order for judgment. Filed Dec. 5, 1890. (Signed) Julius A. Coller, clerk.

Ex. B.—Resolution.

Chicago, St. Paul, Minneapolis and Omaha Railway Company.

At a meeting of the board of directors of the Chicago, St. Paul, Minneapolis and Omaha Railway Company duly called and held at the office of the company, No. 52 Broadway, New York, on the 21st day of April, A. D. 1881, at 12 o'clock of said day, there being
46 present a quorum of said board, the following preamble and resolutions were duly adopted, that is to say:

Whereas, the legislature of the State of Minnesota, at its session of 1881, passed divers acts, to wit: An act entitled, "An act to confer upon the Chicago, St. Paul, Minneapolis and Omaha Railway Company, the rights, powers, franchises, privileges and immunities, within the State of Minnesota, heretofore conferred upon the Chicago, St. Paul and Minneapolis and West Wisconsin Railway Companies, and to declare the Chicago, St. Paul, Minneapolis and Omaha Railway Company the successor, in the State of Minnesota, of the Chicago, St. Paul and Minneapolis and West Wisconsin Railway Companies." Approved February 11, 1881, and—

An act entitled "An act to authorize the Chicago, St. Paul, Minneapolis and Omaha Railway Company to purchase, own and operate the St. Paul & Sioux City railroad and its proprietary or connecting roads, and to issue stock and bonds thereon." Approved February 11, A. D. 1881, and—

An act entitled "An act to authorize the Chicago, St. Paul, Minneapolis and Omaha Railway Company to acquire, construct, maintain and operate railroads in the State of Minnesota." Approved February 11, A. D., 1881; each and all of which said acts grant to, and confer upon the Chicago, St. Paul, Minneapolis and Omaha Railway Company, divers rights, powers, privileges and immunities, within the State of Minnesota, the exercise of which, it is believed, will be of benefit to the said railway company; and
47 Whereas, it is deemed advisable that the company should, by formal resolution, evince its acceptance of said acts, and the rights, powers, franchises, privileges and immunities by the same granted and conferred. Now therefore,

Resolved, That the Chicago, St. Paul, Minneapolis & Omaha Railway Company hereby accept the several acts of the legislature of the State of Minnesota hereinabove referred to, and the rights, powers, privileges, franchises and immunities granted and conferred by each of said acts; subject to the limitations, restrictions and conditions in each of said acts contained.

Resolved, That the secretary be and he is hereby directed to file with the secretary of the State of Minnesota a copy of the foregoing preamble and resolutions, duly certified and sealed.

I, C. W. Porter, secretary of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, do hereby certify that I have carefully compared the above and foregoing with the original thereof in my custody as such secretary, and that the same is a true and correct

copy of said preamble and resolutions, and of the whole thereof; and I do further hereby certify that the said resolutions were duly adopted at the meeting of the board of directors as set forth in the caption hereto.

In witness whereof, I have hereunto set my hand as such secretary, and affixed the corporate seal of said company this 10th day of May, A. D. 1881.

[CORPORATE SEAL.] C. W. PORTER, *Secretary.*

48 Filed May 10th, A. D. 1881, at 4 o'clock p. m.

FRED. VON BAUMBACH,
Secretary of State.

STATE OF MINNESOTA, }
Department of State. }

I, H. Mattson, secretary of state of the State of Minnesota, do hereby certify that I have compared the annexed copy with the original record in my office of resolutions of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and that said copy is a true and correct transcript of said record and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the great seal of the State at the capitol, in St. Paul, this twenty-sixth day of November, A. D. eighteen hundred and ninety.

[STATE SEAL.] H. MATTSON,
Secretary of State.

(Title of Cause.)

49 *Bill of Costs.*

Amount claimed in summons:

Principal	$——
Interest	

Plaintiff's costs and disbursements:

Statutory costs	$5 00
Three affidavits	75
Sheriff's fees	2 60
Clerk's fees (to be added)	3 25
Referee's fees	90 00

Witness fees as follows:

Dr. E. W. McCord, 1 day	1 00
Frank Erling, 1 day	1 00
Dr. James H. Dunn, 1 day	1 00
J. J. Hamilton, 1 day	1 00
	$105 60

The above bill of costs and disbursements taxed and allowed at $105.60.

Dated Dec. 5th, 1890.

(Signed) JULIUS A. COLLER, *Clerk.*

50 STATE OF MINNESOTA, } ss:
County of Ramsey, }

J. L. Macdonald, being first duly sworn, deposes and says that he is the attorney of the plaintiff in the above-entitled cause; that the foregoing is a true and correct statement of the costs and disbursements of said plaintiff in the above-entitled proceeding, and that all of the items thereof have been actually and necessarily paid or incurred therein by and on behalf of said plaintiff, and that the above-named witnesses were necessary and material witnesses herein and attended before the referee herein as above stated and gave evidence herein.

(Signed) J. L. MACDONALD.

Subscribed and sworn to before me this 4th day of December, 1890.

(Signed) OTTO K. SAUER,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minn.*

(Endorsed:) Filed Dec. 5, 1890. (Signed) Julius A. Coller, clerk.

Judgment.

(Title of Cause.)

This action was commenced by due service of the summons and complaint herein upon the said defendant, by the sheriff of said county, as provided by law, and said defendant having failed
51 to answer or demur to said complaint or appear therein, and having made default, the said action was by the proper order of said court referred to John L. Townley, Esq., as sole referee therein, to hear, try and determine the same and to report and order a judgment herein; and it was therein further ordered that upon the filing of said report of said referee, judgment be entered herein in accordance with said report; and said referee having filed his report herein, whereby he finds that said plaintiff has been damaged by said defendant, and is entitled to recover herein from it, the sum of twenty-one thousand nine hundred and five dollars and his costs and disbursements herein, and has ordered that judgment be entered herein for the same; now, therefore,

It is adjudged and determined that said plaintiff recover of said defendant herein, the sum of twenty-one thousand nine hundred and five dollars, and his costs and disbursements herein taxed at one hundred and five and $\frac{60}{100}$ dollars amounting in the aggregate to the sum of $22,010.60 and that he have lawful process therefor.

Dated Dec. 5th, 1890.

By the court:

(Signed) JULIUS A. COLLER, *Clerk.*

(Endorsed:) District court, Scott county, Minn. John Roberts *vs.* The Chicago, St. Paul, Minneapolis and Omaha Railway Company. Judgment-roll. Filed Dec. 5, 1890. (Signed) Julius A. Coller, clerk.

52 *Notice of Appeal.*

(Title of Cause.)

You will please take notice that the above-named defendant, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, appeals to the supreme court of the State of Minnesota, from the judgment of this court in this action entered on the 5th day of December, 1890, against this defendant and in favor of the above-named plaintiff.

Dated St. Paul, April 14, 1891.

J. H. HOWE,
S. L. PERRIN,
C. D. O'BRIEN,
Attorneys for Defendant, St. Paul, Minn.

To J. L. Macdonald, attorney for plaintiff, and W. F. Witt, clerk of the district court, Scott county, Minn.

Bond on Appeal.

(Title of Cause.)

Whereas, the defendant in the above-entitled action has appealed to the supreme court of the State of Minnesota from the judgment against it made and entered herein on the fifth day of December, 1890.

Now, therefore, we, E. W. Winter and D. C. Shepherd, do undertake, promise and agree to and with said John Roberts, plaintiff, that said defendant shall pay all costs and charges that may be awarded against it on such appeal, and shall pay the amount
53 directed to be paid by said judgment, or the part of such amount as to which the said judgment is affirmed, if affirmed only in part, if the said judgment appealed from, or any part thereof, is affirmed.

Conditioned, however, that our liability hereunder shall not exceed the sum of thirty thousand dollars.

Dated this 14th day of April, 1891.

E. W. WINTER. [SEAL.]
DAVID C. SHEPHARD. [SEAL.]

Signed, sealed and delivered in presence of—
C. D. O'BRIEN.
CHAS. P. NASH.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Be it known, that on this 14th day of April, A. D. 1891, before me personally appeared E. W. Winter and D. C. Shepherd, to me known to be the same persons described in and who executed the

foregoing undertaking, and each for himself acknowledged the same to be his own free act and deed.

[SEAL.] CHAS. P. NASH,
Notary Public, Ramsey County, Minnesota.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

E. W. Winter and D. C. Shepherd, the persons named in and who executed the foregoing undertaking, being first duly
54 sworn doth each for himself depose and say, that he is a resident and freeholder of the State of Minnesota, and worth the amount of sixty thousand dollars above his debts and liabilities, and exclusive of his property exempt from execution.

E. W. WINTER.
D. C. SHEPHERD.

Subscribed and sworn to before me this 14th day of April, A. D. 1891.

[SEAL.] CHAS. P. NASH,
Notary Public, Ramsey County, Minnesota.

(Undertaking on appeal endorsed:)

The within undertaking and the sureties therein are hereby approved this 14th day of April, 1891.

FRANCIS CADWELL,
District Judge.

55 STATE OF MINNESOTA, } ss:
County of Scott, }

District Court, Eighth Judicial District.

JOHN ROBERTS, Plaintiff,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Defendant.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which is hereto attached and herewith served upon you, and to serve a copy of your answer to said complaint on the subscriber, at his office, in the city of St. Paul, in the county of Ramsey, in said State, within twenty days after the service of this summons upon you, exclusive of the day of service; and if you fail to answer the said complaint within
56 the time aforesaid the plaintiff in this action will upon such failure have the amount he is entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so ascertained, together with the costs and disbursements herein.

Dated —— —, A. D. 188–.

J. L. MACDONALD,
Plaintiff's Attorney, St. Paul, Minn., Globe Building.

Complaint.

(Title of Cause.)

The above-named plaintiff, for complaint against the said defendant herein, respectfully shows to the court, and alleges:

That said defendant is, and for more than one year last past has been, a corporation, duly organized under and pursuant to the laws of the State of Wisconsin, and was duly authorized by the laws of the State of Minnesota to acquire, own and operate the railroads hereinafter named; and it was, and it is for the purpose of this action, a domestic corporation of the State of Minnesota, under and pursuant to the said laws thereof; and that it was during that time the owner of a certain railroad extending from the city of St. Paul, in said State, and through said State of Minnesota to Sioux City, in the State of Iowa, which railroad was formerly named the
57 St. Paul and Sioux City railroad, which was, and is now, known as the Western division of the Chicago, St. Paul, Minneapolis and Omaha railway, of defendant, together with the tracks, rolling stock, cars, locomotives, water tanks and other appliances thereunto belonging, and then and there operated said railroad, and was a carrier of freight and passengers thereupon for hire, and that it then and there became, and was the duty of the said defendant to procure and have good and safe and properly constructed and located railroad and tracks, water tanks, locomotives, machinery, and other appliances and apparatus to operate said railroad.

That on the 7th day of March, A. D. 1890, the said plaintiff was employed by said defendant as a fireman upon one of its said locomotives, at and for a certain hire and reward agreed upon by the parties hereto in that behalf, and on that day was so employed upon said locomotive at the village of St. James, in the county of Watonwan, in the State of Minnesota, the said locomotive being then and there used for the purpose of hauling trains of freight cars from the city of St. Paul to the village of St. James, and from said village of St. James to said city of St. Paul; and that said plaintiff had only been engaged as a fireman as aforesaid upon locomotives hauling trains from the said city of St. Paul to the said village of St. James and back to said St. Paul a short time, and did not before the injury herein complained of know or have notice of the defective and negligent construction and location of tracks and water tanks, as herein stated.

That said defendant in the construction of its said railroad and appliances thereto belonging, including its side tracks and
58 water tanks thereunto belonging and connected therewith, and in the operation of its said railroad, engines, locomotives and trains thereof, conducted itself so carelessly, negligently and unskillfully, as hereafter stated, that by and through the carelessness, negligence and default of said defendant and its servants it provided, used, and suffered to be used, an unsafe, defective and im-

properly constructed railroad, and side track and a water tank used in connection therewith, at said village of St. James, and carelessly and negligently operated the same, and injured this plaintiff, as hereinafter stated.

That in and at St. James there is owned and operated by said defendant, as a part of its said railroad and appliances, a turn-table, to turn or reverse locomotives and cars, and a side track leading from the main track of said railroad to said turn-table, and that near the point where this side track intersects the said main track there was, and is, a water tank, from which the locomotives of defendant operated on said railroad can there be supplied with water, and that the base or substructure of said water tank was about twelve feet square.

That the said carelessness, negligence, unskillfulness and default of said defendant, herein complained of, consisted in this: That said water tank and side track were constructed and located too near to each other, and not more than two feet apart, and so negligently and carelessly constructed and located that in passing the same on said side track the side of the locomotives then and there used by said defendant, and the tenders thereof, and next
59 thereto, including the one on which plaintiff was then so employed, would not be, and was not, more than four inches from said water tank and base or substructure thereof; and that on the 7th day of March, A. D. 1890, the said locomotive upon which the said plaintiff was then employed and engaged, as hereinbefore stated, was standing upon the said side track a short distance from said water tank, and after having been turned around and reversed upon said turn-table, with the engineer thereof and this plaintiff thereon, and that while so then and there upon said locomotive this plaintiff, in the line of his duty as fireman thereof, and the proper and necessary performance thereof, stepped out of the cab of said locomotive upon the run or side of the tender and tank thereof and thereto attached, to get some material called "waste" from the proper receptacle thereof, to wipe off and clean said engine or portions thereof; and that immediately after so stepping out upon the run of said tender, and without any notice to said plaintiff, and before plaintiff could return into said cab, or leave where he then was, or avoid being caught and injured, the said engineer, without knowledge of this plaintiff, or notice to him, or any fault or negligence upon the part of this plaintiff, in response to the orders of the conductor in charge, started and moved said locomotive towards said main track, and thereupon and immediately thereafter this plaintiff was, by reason of the negligence herein mentioned, caught between said locomotive tender and tank attached thereto and said water tank and base or substructure thereof, and was thereby, and
60 before he could escape, caught between said tender and the said water tank, and crushed, bruised and wounded, and his collar-bones and other bones fractured and broken, and he was otherwise severely injured, whereby he became sick, sore, lame and disordered and disabled and deformed, and made to suffer great pain, and has ever since been crippled and in pain and in suffering,

and disabled and deformed, and unable to perform manual labor, as he was prior to this injury, or to earn a livelihood, as long as he lives, because of said injury to him.

That to be properly and carefully constructed and located, said water tank and base or substructure thereof, and said side track, should have been constructed and located at least five feet from each other, and far enough apart and so constructed that there would have been not less than two feet between said water tank and base and substructure thereof and the side of any of said locomotives or tenders thereof when passing said water tank.

That plaintiff did not by his own fault or carelessness or negligence or in any manner contribute to his being so injured, and the same was wholly caused by the negligence and carelessness of said defendant and its servants, as hereinbefore stated. That this plaintiff is a young man in the prime of life, and immediately prior to his being injured, disabled, crippled and deformed as aforesaid was in good health, and able-bodied and without disability, and capable of earning a livelihood, and was, when so injured, earning not less than seventy-five dollars per month.

61 That by reason of the facts hereinbefore stated this plaintiff has been damaged in the sum of thirty thousand dollars.

Wherefore, he prays judgment herein for the sum of thirty thousand dollars, and his costs and disbursements herein.

J. L. MACDONALD,
Attorney for Plaintiff, Globe Building, St. Paul, Minn.

STATE OF MINNESOTA, }
County of Scott, } ss:

John Roberts, being first duly sworn, upon oath says, that he is the plaintiff in the foregoing within entitled action; that he knows the contents of the foregoing complaint; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

JOHN ROBERTS.

Subscribed and sworn to before me this 13th day of October, 1890.

J. L. MACDONALD,
[NOTARIAL SEAL.] *Notary Public, Ramsey Co., Minn.*

Filed November 1st, A. D. 1890.

62 *Petition for Removal.*

(Title of Cause.)

To the honorable the district court for said county of Scott:

Your petitioner, The Chicago, St. Paul, Minneapolis, and Omaha Railway Company, respectfully shows to this court—

That the above-entitled action has been brought, and is now pending, in the court aforesaid, by the plaintiff above named against

your petitioner as sole defendant therein, to recover from your petitioner alleged damages for alleged carelessness, negligence and unskillfulness in the construction and location of certain structures and tracks of its railway, and other negligence, and that said action is wholly of a civil nature; that the matter and amount in dispute in said action and suit exceeds, exclusive of interests and costs, the sum — value of two thousand dollars, all of which will more fully appear by the complaint in said action, to which reference is hereby made, and which is hereby made a part hereof.

That the controversy in said action and suit is wholly between citizens of different States, and that your petitioner, the defendant therein, is a foreign corporation, and was at the time of the commencement of this suit, ever since — been, and still is a non-resident of the State of Minnesota, and was at said time, ever since has been, and still is, a corporation, duly created, organized and existing under and by virtue of the laws of the State of Wisconsin, and
63 that it at all said times was, and is now, a citizen of the State of Wisconsin, having its principal office and place of business in the city of Hudson, in the State last named; that the plaintiff, John Roberts, prior to the commencement of said action was, ever since has been, and still is, a citizen of the State of Minnesota, and did and still does, reside in and was, and still is, an inhabitant of, the district of Minnesota, within which district is the county of Scott, the county in which the said action and suit was brought, and is now pending; that the time within which the defendant is required by the laws of the State of Minnesota, and the rules of said district court in the county of Scott, in the said eighth judicial district, to answer or plead to the complaint in said action has not expired.

That your petitioner has made, and herewith files, a bond, with good and sufficient sureties, for its entering in the circuit court of the United States for the district of Minnesota, third division, on the first day of its next session, a copy of the record in said action and suit, and for paying all costs that may be awarded by the said circuit court, if the said circuit court shall hold that the said suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays the court to accept this petition and said bond, and to proceed no further in said suit.

CHICAGO, ST. PAUL, MINNEAPOLIS AND
OMAHA RAILWAY COMPANY,
By E. W. WINTER, *General Manager.*

J. H. HOWE,
S. L. PERRIN,
Attorneys for Petitioner.

64 STATE OF MINNESOTA, } ss:
County of Ramsey, }

E. W. Winter, being duly sworn, says, that he is an officer, to wit, the general manager, of the Chicago, St. Paul, Minneapolis &

Omaha Railway Company, the corporation petitioner above named; that he has read the foregoing petition, and knows the contents thereof, and that the same, and all statements and allegations therein, are true.

E. W. WINTER.

Subscribed and sworn to before me this 31st day of October, A. D. 1890.

S. L. PERRIN,
[SEAL.] *Notary Public, Ramsey County, Minnesota.*

Endorsed: Filed Nov. 1, 1890.

Bond on Removal.

(Title of Cause.)

Know all men by these presents, that we, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, as principal, and E. W. Winter and Chas. W. Johnson, of St. Paul, Minnesota, as sureties, are held and firmly bound unto John Roberts in the penal sum of two hundred and fifty dollars, lawful money of the United
65 States of America, the payment of which said sum well and truly to be made unto the said John Roberts, his heirs and assigns, the above-bounden principal hereby binds itself, its successors and assigns, and the said sureties hereby bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of October, A. D. 1890.

The condition of the above obligation is such that, whereas, a certain suit was brought on or about the 15th day of October, A. D. 1890, in the district court for the county of Scott, in the eighth judicial district of the State of Minnosota, by the said John Roberts against the above-bounden principal, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, and the said suit is now pending in the court aforesaid, and is removable into the circuit court of the United States for the district of Minnesota, third division, and the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, the sole defendant in said suit, intends to file its petition in the said district court, praying for the removal of said suit from said district court to the said circuit court.

Now therefore, if the said petitioner, The Chicago, St. Paul, Minneapolis & Omaha Railway Company, shall enter in the said circuit court of the United States for the district of Minnesota, third division, on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court of the United States, if said circuit court shall hold

that said suit was wrongfully or improperly removed thereto,
66 then this obligation to be void, otherwise to remain in full force and effect.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
By E. W. WINTER, *General Manager.*
E. W. WINTER. [SEAL.]
CHAS. W. JOHNSON. [SEAL.]

Signed, sealed and delivered in the presence of—
S. L. PERRIN.
H. P. BARLOW.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

E. W. Winter, to me known to be the general manager of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, the principal named in the foregoing bond, and to me known to be the person who executed the same, came personally before me this 31st day of October, A. D. 1890, and acknowledged the execution of the foregoing instrument to be his free act and deed, and the free act and deed of the said principal. Also came personally before me the said E. W. Winter and Chas. W. Johnson, to me well known to be the persons who executed the foregoing bond as sureties, and each acknowledged the same to be his free act and deed.

S. L. PERRIN,
[SEAL.] *Notary Public, Ramsey County, Minn.*

67 STATE OF MINNESOTA, } ss:
County of Ramsey, }

E. W. Winter and Chas. W. Johnson, being first duly sworn, doth say, each for himself, that he is one of the persons who signed the foregoing bond as sureties, that he is a resident and freeholder of the State of Minnesota, and that he is worth the sum of five hundred dollars above his debts and liabilities, and exclusive of property exempt from sale on execution.

E. W. WINTER.
CHAS. W. JOHNSON.

Subscribed and sworn to before me this 31st day of October, A. D. 1890.

S. L. PERRIN,
[SEAL.] *Notary Public, Ramsey County, Minn.*

Endorsed: Filed Nov. 1, 1890.

Affidavit for Order to Show Cause.

(Title of Cause.)

STATE OF MINNESOTA, }
County of Ramsey, } ss:

S. L. Perrin, being by me first duly sworn, says that he is now, and for more than five years last past has been, the attorney for the above-named defendant, and that he is one of the attorneys
68 of record for said defendant in the action above entitled; that said defendant is a corporation, duly created, organized and existing under and by virtue of the laws of the State of Wisconsin, and is a citizen of said State of Wisconsin, and was such corporation and such citizen at all the times hereinafter referred to; that the plaintiff was at said times, and is now, a citizen of the State of Minnesota; that the action above entitled was commenced by the service of a summons and complaint on the defendant on the 15th day of October, 1890, A. D. and is an action to recover the sum of thirty thousand dollars, and the costs and disbursements herein, of and from the defendant, for alleged damages for alleged personal injuries, claimed by the plaintiff to have been caused by the negligence of the defendant; that on or about the first day of November, A. D., 1890, and prior to the expiration of the time within which the defendant was required by the laws of the State of Minnesota and the rules of said district court of said Scott county, the court in which said action was pending, to answer or plead to the plaintiff's said complaint herein, affiant, as such attorney, caused to be made and filed in the office of the clerk of said district court a duly verified petition by said defendant, praying the removal of said cause to the circuit court of the United States for the district of Minnesota, and did cause to be made and filed with said petition a proper bond, with good and sufficient surety, for its entering in said circuit court on the first day of the next session, a copy of the record in such suit, and for paying all costs that might be awarded
69 by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto; that the clerk of said district court of Scott county did make a certified copy of the record in said cause in said court, and that the same was duly filed in the office of the clerk of said circuit court of the United States for the district of Minnesota, at St. Paul, in said district, on the 3rd day of November, A. D. 1890, and on said last-named day the said defendant filed its duly verified answer to said complaint; that the time within which the defendant was required by the laws of Minnesota and the rules of this court to answer or plead in said cause did not expire until the 4th day of November, A. D. 1890.

Affiant further says that subsequent to the removal of said cause as aforesaid, and notwithstanding such removal, and subsequent to the filing by affiant of the defendant's answer to said complaint, on the 3rd day of November, A. D. 1890, as hereinbefore set forth, and notwithstanding such answer, the plaintiff made or caused to

be made, and presented to Hon. J. C. Edson, district judge of said district court of Scott county, an affidavit setting forth that no answer or appearance had been made on the part of said defendant in said cause, and claimed and pretended in said affidavit that said defendant was in default, and therefore moved the said judge for an order of reference therein, which order was granted, but of which application and motion the said defendant and this affiant and his associate therein had no notice; that pursuant to said order of reference, so as aforesaid procured by said plaintiff subsequent to the removal of
70 said cause to said circuit court of the United States, the said plaintiff has caused testimony to be taken in said cause, and has made and filed therein a pretended judgment-roll, and has entered in said district court of Scott county, a judgment against the defendant herein for the sum of twenty-one thousand nine hundred and five dollars damages, and one hundred and five dollars and sixty cents costs, in all twenty-two thousand and ten dollars and sixty cents, which said judgment was entered and docketed on the 5th day of December, A. D. 1890, and so remains of record, a lien and incumbrance upon the property of defendant, and may be executed, and defendant's trains of cars stopped, and great public inconvenience result. That all said proceedings by and on behalf of the said plaintiff were had and taken, and said order was procured, and said judgment was taken and entered, without any notice to the defendant, its officers, agents or attorneys, and without its or their knowledge.

Wherefore, affiant prays that an order may be made and entered herein that the plaintiff show cause if cause there be, why the said judgment be not vacated and set aside, and that such order stay all proceedings herein pending the final hearing and determination thereof.

S. L. PERRIN.

Subscribed and sworn to before me this 30th day of December, A. D. 1890.

[NOTARIAL SEAL.] CHAS. P. NASH,
Notary Public, Ramsey County, Minnesota.

71 *Order to Show Cause.*

(Title of Cause.)

On reading the attached affidavit of S. L. Perrin, one of the attorneys for the defendant, showing, among other things, that a judgment has been rendered and entered herein in favor of the said plaintiff and against the said defendant, without notice, and after the same had been removed into the circuit court of the United States for the district of Minnesota, and that said judgment is now of record and liable to be executed, and that a stay of proceedings is proper to be ordered, and it appearing to the court that an exigency exists whereby delay for the time necessary to give the statutory notice of

motion may cause irreparable injury to the defendant, in the delay to trains and otherwise, and an interference with the public convenience, it is now, on motion of said attorney for the defendant,

Ordered, that plaintiff show cause, if cause there be, at a special term of the district court for the county of Hennepin, in the fourth judicial district of the State of Minnesota, a district adjoining the said eighth judicial district, to be held at the court-house in the city of Minneapolis, in said Hennepin county, the same being at a less distance from the county-seat of Scott county than is Glencoe, the residence of the Hon. J. C. Edson, the judge of the said eighth judicial district, on Saturday, the third day of January, A. D. 1891, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why the said judgment should not be vacated and set aside.

72 It is further ordered, that pending the hearing and determination hereof all proceedings in said action be staid.

Let a copy of this order be served on the plaintiff's attorney at least two days prior to the time fixed for such hearing.

December 30, 1890.

By the court:

HENRY G. HICKS,
Judge of the 4th Judicial District of the State of Minnesota.

Filed April 15, 1891.

Affidavit in Answer to Order to Show Cause.

(Title of Cause.)

STATE OF MINNESOTA, } ss:
County of Hennepin, }

J. L. MacDonald, being duly sworn, deposes on oath and says:

That he is the attorney for plaintiff in the above-entitled action, and has been such attorney since the commencement thereof.

That no answer or demurrer was ever served upon this deponent in said action, and that he has not had any notice of appearance or other paper herein served upon him by said defendant prior to the affidavit and order to show cause herein, requiring said plaintiff to show cause before the district court in and for the

73 county of Hennepin, on the 3rd day of January, 1891, why the judgment entered herein should not be vacated and set aside; and that except by the service of said affidavit and order to show cause, this deponent has not had any notice that said defendant appeared in said action in any manner.

That this plaintiff did not present to the court for the eighth judicial district any proof of the default of said defendant, and its failure to answer or demur herein, or to appear herein in any manner, until the 7th day of November, 1890, and that on said last-mentioned day the said court made an order of reference in said action, and the same was thereafter duly tried by the referee so ap-

pointed; and that said report of said referee was not filed herein, and the judgment mentioned in said affidavit entered herein was not so entered and docketed until the 5th day of December, 1890.

That said plaintiff and this deponent did not have or receive any notice from said defendant of the filing of the petition for removal and bond mentioned in said affidavit, and that the same was clandestinely and secretly filed in the office of the clerk of said court, without the knowledge of or any notice to said plaintiff or said deponent, and that a certified copy of the same, and the then record of said action, was made, and the same filed in the office of the clerk of the circuit court of the United States, as stated in said affidavit, without said petition or bond being in any manner presented or submitted to the judge of said court; and that said petition
74 and bond *was* so filed, and said certified copy of the same and of said record made, as stated in said affidavit, without the knowledge or consent of said court or judge thereof, or the procurement of any order thereon from said court.

That the answer of said defendant, which is mentioned in said affidavit, has never been, by copy or otherwise, or in any manner, served upon this deponent; and that he has never seen the same, and did not know that said defendant had, or claimed to have, answered the complaint herein until he read said affidavit.

J. L. MACDONALD.

Subscribed and sworn to before me this 3rd day of January, A. D. 1891.

H. E. JOHNSON,
Deputy Clerk District Court, Hennepin County, Minn.

[District Court Seal.]

Filed April 15, 1891.

Affidavit on Order to Show Cause.

(Title of Cause.)

STATE OF MINNESOTA, } ss:
County of Scott, }

Personally appeared William F. Witt, who, being duly sworn, deposes on oath and says:

That he is the clerk of said court since the 6th day of January, A. D. 1891, duly elected and qualified as such; and that for
75 more than six months immediately prior to the said 6th day of January, A. D. 1891, he was the duly appointed and qualified deputy of the clerk of said court, and during all that time was in said office, and had general charge of the same as such deputy.

That on the first day of November, A. D. 1890, there was presented to him as said deputy clerk, and for and in behalf of said defendant, what was represented and purported to be a copy of the summons and complaint herein, and a petition for the removal of said action to the circuit court of the United States for the district

of Minnesota, and a bond for the same; copies of which said copy summons and complaint, and of said petition and bond, are hereto attached, and marked respectively "A," "B," "C," and "D," and made a part of this affidavit; and this deponent was then and there requested by said defendant to then and there file said copy summons and complaint and said petition and bond in said office, and in said action, and that he then and there did so file them.

That upon so filing said copy summons and complaint and said petition and bond, he was thereupon requested by said defendant to make a copy of each and all of them, and to certify to the same as being a copy of the record in said action.

That said copy summons and complaint and said petition and bond were the first papers filed in said action, and the only papers then on file therein, and then constituted the entire record therein, and that this deponent thereupon and on said first day of November, A. D. 1890, as said deputy clerk of said court, made a

76 copy of said copy summons and complaint and of said petition and bond, and of the endorsements of filing thereon, and certified to the same as being a true copy of the same, and of the record of said action in said clerk's office, and then and there delivered the same to the person acting for and representing said defendant in the matter.

That the copies of said copy summons and complaint and of said petition and bond, so hereto attached, and marked respectively "A," "B," "C," and "D," constitute and are a full and complete copy of what this deponent then made and certified to as the record of and in said action, and delivered to the said defendant as hereinbefore stated.

That said copy summons and complaint and said petition and bond, so filed as hereinbefore stated, or either of them, had not been at the time of said filing the same, or at any time before copies thereof were so made by this deponent, submitted to said court, or the judgment thereof, and that no order directing that said action be removed to the circuit court of the United States was made or filed therein before or when this deponent made said certified copies of said copy summons and complaint and said petition and bond, and that no such order of said district court, in and for said county of Scott, or any other court has since been filed herein in said clerk's office.

That this deponent made all of said copies, and so certified to the same, solely upon and at the request of the defendant, and without any order or direction from said district court in and for said county of Scott, or any other court, requesting or directing him so to do.

77 That on said first day of November, A. D. 1890, the said district court in and for said county of Scott was not open, and that Hon. J. C. Edson is the judge thereof, and resides in the village of Glencoe, in the county of McLeod, in said State of Minnesota, and that this deponent was then informed, and believes, that he, said judge, was then at his home in said village of Glencoe.

WILLIAM F. WITT.

Subscribed and sworn to before me this 8th day of January, A. D. 1891.

[OFFICIAL SEAL.] N. MEYER,
Judge of Probate.

Filed April 15, 1890.

Order Discharging Order to Show Cause.

(Title of Cause.)

The above-entitled cause came on to be heard at a special term of the district court in and for the county of Hennepin, on the 17th day of January, 1891, upon an order to show cause why the judgment heretofore entered and rendered in said action be not set aside and vacated. Mr. Perrin argued for the order to be made absolute. Mr. MacDonald *contra;* both counsel filed briefs.

After having duly considered the matter, the court is of the opinion that at the time of the entry of the judgment in said
78 action the same was pending in the said district court of Scott county, and had not been removed to the circuit court of the United States and that the defendant was in default as for want of an answer and that said judgment was duly rendered in said action. It is therefore ordered that the order to show cause be and the same hereby is discharged, and that the motion to vacate said judgment be denied.

April 13, 1891.

By the court:

HENRY G. HICKS, *Judge.*

Memorandum of Opinion.

The only grounds assigned by the defendant for an order vacating the judgment in the case at bar are:

1. "That the defendant was not in default."

2. "That the court had no jurisdiction of the case for any purpose."

Both of the grounds depend upon one and the same fact, viz: whether at the time of the entry of judgment the cause was pending in the district court of Scott county, Minnesota, or had been removed to the circuit court of the United States, for if the cause was then pending in said district court of Scott county there had been no appearance by the defendant, *i. e.*, no answer, demurrer, or written notice of appearance given plaintiff as required by section 72, chap. 66, General Statutes 1878, and hence it was in default and plaintiff was entitled to enter judgment under sec. 210, chap. 66, *supra.*
79 But if the cause had, prior to the entry of judgment, been removed from said district court of Scott county to the circuit court of the United States, then the district court had no jurisdiction to enter the judgment and the answer filed by the defendant with the clerk of the circuit court was filed in time and defendant was not in default. So that in fact the only and real ground upon

which the defendant asks the order of this court, is that at the time of the entry of judgment the cause had been removed to the circuit court of the United States.

The facts are undisputed, viz: The action had been duly commenced in the said district court of Scott county, Minnesota, on the 15th day of October, 1890, by personal service upon defendant of the summons and complaint therein.

On the 1st day of November next thereafter the defendant filed with the clerk of said district court of Scott county, the copy of the summons and complaint so served upon it, and also a petition and bond for the removal of such cause to the circuit court of the United States. The clerk thereupon made copies of all papers so filed with him by the defendant in said cause (which were all the papers filed therein) and duly certified the same to be correct, which certified copies the defendant duly filed in the office of the clerk of circuit court of the United States, at St. Paul, Minnesota, on the third day of November, 1890, at the same time the defendant also filed in the office of the clerk of said circuit court, its answer to the complaint in said action.

80 The petition and bond were not presented to the judge of said district court. On the 7th day of November, 1890, the plaintiff presented to the judge of said district court an affidavit stating that defendant had not answered, demurred or given notice of appearance to plaintiff in said action and without any knowledge of the acts of the defendant in filing the petition and bond as aforesaid, plaintiff, without notice to defendant, procured from the judge of said district court, an order of reference and thereafter such proceedings were duly had, that on the 4th day of December, 1890, judgment was entered in said action in favor of plaintiff and against the defendant.

Upon this state of facts, it is apparent that the only question necessary or proper to be decided is not whether the defendant had the right to remove said cause, but whether in fact it did remove it by filing its petition and bond with the clerk of said district court and certified copies thereof and of the pleadings in said action with clerk of said circuit court.

We think the question was well and clearly decided in Shedd *vs.* Fuller, 36 Fed. Rep. 609, by Gresham, circuit judge, in the following language: "It is not sufficient to present the petition and bond to the clerk, who is the court's mere ministerial officer.

"While it is clear that the right of removal does not depend upon the action or non-action of the State court, it is equally clear that the State court cannot be deprived of the right to decide for itself upon the sufficiency of the petition and bond.

"The presentation of a proper petition and bond *to the State's court* is a jurisdictional prerequisite."

(The italics are ours.)

81 The defendant in the case at bar never having complied with this "conditional prerequisite" the cause was never removed from the district court of Scott county. The defendant was

in default and the district court of Scott county had jurisdiction to enter judgment.

The order to show cause must be discharged and the motion to vacate the judgment must be denied.

HENRY G. HICKS, *Judge.*

STATE OF MINNESOTA, }
County of Scott. }

District Court, Eighth Judicial District.

JOHN ROBERTS, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Defendant.

You will please take notice that the above-named defendant appeals to the supreme court of the State of Minnesota, from the order of this court in this action, entered on the 15th day of April, 1891, discharging the order to show cause why the judgment herein should not be vacated and set aside and overruling defendant's motion to set the same aside; said appeal is from the whole of said order.

Dated May 1st, 1891.

J. H. HOWE AND
S. L. PERRIN,
Attorneys for Defendant.

To J. L. MacDonald, Esq., attorney for plaintiff, and William Witt, Esq., clerk of the district court for Scott county.

82 Receipt of a copy of the within notice of appeal is hereby admitted this 6th day of May, 1891.

J. L. MACDONALD,
Plaintiff's Attorney.

Due service admitted this 13th day of May, 1891.

W. F. WITT, *Clerk.*

Filed May 13, 1891.

STATE OF MINNESOTA, }
County of Scott. }

District Court, Eighth Judicial District.

JOHN ROBERTS, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Defendant.

Whereas, the defendant in the above-entitled action has appealed to the supreme court of the State of Minnesota from the order made and entered herein on the 15th day of April, 1891:

Now, therefore, we, E. W. Winter and R. W. Clark, do undertake,

promise and agree to and with said John Roberts that said defendant shall pay all costs and charges that may be awarded against it on such appeal.

Conditioned, however, that our liability hereunder shall not exceed the sum of three hundred dollars.

Dated this first day of May, 1891.

E. W. WINTER. [SEAL.]
R. W. CLARK. [SEAL.]

E. P. H. WEST.
H. P. BARLOW.

83 STATE OF MINNESOTA, } ss:
County of Ramsey, }

Be it known that on this 1st day of May, A. D. 1891, before me personally appeared E. W. Winter and R. W. Clark, to me known to be the same persons described in and who executed the foregoing undertaking, and each for himself acknowledged the same to be his own free act and deed.

S. L. PERRIN,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

E. W. Winter and R. W. Clark the persons named in and who executed the foregoing undertaking, being first duly sworn doth each for himself depose and say, that he is a resident and freeholder of the State of Minnesota, and worth the amount of six hundred dollars above his debts and liabilities, and exclusive of his property exempt from execution.

E. W. WINTER.
R. W. CLARK.

Subscribed and sworn to before me this 1st day of May, A. D. 1891.

S. L. PERRIN,
Notary Public, Ramsey County, Minnesota.

Received a copy of the foregoing bond May 6th, 1891.

J. L. MACDONALD,
Plaintiff's Attorney.

Filed May 13, 1891.

84 STATE OF MINNESOTA, } ss:
County of Scott, }

District Court, Eighth Judicial District.

I, William F. Witt, clerk of the district court, Scott county and State of Minnesota, do hereby certify that I have compared the foregoing paper-writing with the original summons & complaint, affidavit of default, & order of reference, oath & report of referee, judg-

ment-roll, affidavit & order to show cause, affidavit of J. L. Macdonald, decision, petition & bond, certified copy of resolution of acceptance, notice of appeal & undertaking of appeal in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

[SEAL.] Witness my hand and the seal of said court, at Shakopee, this 9th day of July, A. D. 1891.

W. F. WITT,
Clerk of the District Court.

Endorsed: 7144. Dist. court, Scott Co. Jno. Roberts *v.* Ch'go, St. Paul, Mnpls. & Omaha R'y Co. Return to supreme court. Filed July 10th, 1891. C. P. Holcomb, clerk.

85 STATE OF MINNESOTA:

Supreme Court.

JOHN ROBERTS, Respondent,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Appellant.

Upon reading and filing the annexed affidavit and exhibits thereto attached, it is—

Ordered that said appellant show cause, before this court, on the 5th day of January, A. D. 1892, at half past nine o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why the stipulation and judgment entered thereunder, which are Exhibits "C" and "D" attached to said affidavit, are not now conclusive upon it upon this appeal, and why the order and judgment herein appealed from should not because of said stipulation and judgment be each and severally affirmed, and why the said affidavit and said copy exhibits thereto annexed should not be attached to and made a part of the record herein upon this appeal.

Ordered that appellant have notice hereof by service of a copy of this order and said affidavit and exhibits at least twenty-four hours before said hearing.

By the court:

WM. MITCHELL, *Judge.*

Dated January, A. D. 1892.

86 STATE OF MINNESOTA:

Supreme Court.

JOHN ROBERTS, Respondent,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Appellant.

STATE OF MINNESOTA, *County of Ramsey*, } ss:

Personally appeared before me J. L. Macdonald, who, being sworn, deposes and says that he is the attorney for said respondent (plaintiff) in the above-entitled action, and has been said attorney since the commencement thereof in all the courts and proceedings hereinafter mentioned and referred to.

That after said appellant herein had filed the copies of the petition and bond for removal to the circuit — of the United States in and for this district thereof, as more fully appears by the return to the appeal herein to this court, this action was erroneously and without said circuit court acquiring jurisdiction thereof placed upon the calendar of the January, 1891, term of said court, and that thereafter and on or about the 13th day of said January, 1891, this deponent as said attorney herein appeared specially in said circuit court, and for that purpose only, and objected (in writing then filed) to the jurisdiction of said circuit court of the United States upon the several grounds therein stated; a copy of which objec-
87 tions is hereto attached, marked "A," and made a part hereof.

That upon so making said objections to the jurisdiction of said circuit court and in support thereof this deponent then offered the files and records of said circuit court relating to said action and the affidavit which is attached to said objections, marked "A," and a part thereof, and moved said court to strike said action from the said calendar as not removed to or in said circuit court of the United States, and that thereafter and upon said objections and motion and not otherwise said circuit court of the United States made the order sustaining said objections and granting said motion and ordering said action to be remanded to the district court in and for the county of Scott and State of Minnesota; a copy of which order is also hereto attached and marked "B."

That thereafter and on the 4th day of November, A. D. 1891, and long after this appeal had been perfected and the paper book and first brief of appellant and the brief of respondent had been served by the respective parties herein, the parties hereto, at the request of said appellant, entered into the stipulation, a copy of which is hereto attached and marked "C" and which is made a part hereof.

That the "order or decision of Judge Nelson," mentioned in said stipulation, is the same decision of said circuit court of the United States, a copy of which is hereto annexed and marked "B," and is the same order and decision which is set forth upon pages five and six of appellant's brief upon this appeal.

That immediately thereafter and pursuant to said stipula-
88 tion judgment was duly rendered, given, and made by said circuit court of the United States; a copy of which judgment is hereto attached and marked "D" and made a part hereof.

That said judgment has not been set aside or vacated or in any manner impaired and is in full force, virtue, and effect, and that said judgment relates wholly and exclusively to the action and order or decision mentioned in said stipulation, and that the action therein adjudged to be remanded is this action and which was attempted by said appellant to be removed to the said circuit court of the United States.

Wherefore this deponent, upon and in behalf of said respondent, prays that said appellant may be required to show cause upon the hearing of said appeal why said stipulation and agreement and judgment so entered pursuant thereto *is* not conclusive and binding upon it, and why the judgment and order herein appealed from should not for that reason, in addition to the others urged by respondent, be each severally affirmed, and why this affidavit and the said copies thereto attached should not be added to the return and record of this action and appeal in this court.

J. L. MACDONALD.

Subscribed and sworn to before me this 2nd day of January, A. D. 1892.

[SEAL.] JOHN McKEAN,
Notary Public Ramsey County, Minnesota.

Endorsed: 7144–7175. State of Minnesota supreme court. John Roberts, respondent, *vs.* The Chicago, St. Paul, Minneapolis & Omaha Railway Company, appellant. Order to show cause and affidavits. Original. Filed Jan'y 5, 1892. C. P. Holcomb, clerk. J. L. Macdonald, attorney for respondent.

89 "A."

In the Circuit Court of the United States for the District of Minnesota.

JOHN ROBERTS, Plaintiff,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendant.

The above-named plaintiff appears specially herein and for the sole purpose of objecting to the jurisdiction of said court to take cognizance of, consider, or hear, try, or determine said action, and so objects for the following reasons, among others, to wit:

First. Said action is not now and never has been in said court.

Second. Said action was commenced in the district court in and for the county of Scott and State of Minnesota, and the same has never been removed to this court.

Third. That judgment has heretofore been duly rendered and en-

tered in said action in said State court in favor of said plaintiff and against said defendant, and that within the past fifteen days and since the filing of the pretended record herein the said defendant has appeared in said action in said State court and did therein and on the third day of January, A. D. 1891, move said State court to have said judgment so rendered and entered in said action
90 vacated and set aside, and that that motion is now pending, upon the merits thereof, before said State court and the argument thereof has been continued, by consent of both parties hereto, until next Saturday, the 17th day of January, A. D. 1891.

Fourth. That by making said motion and said appearance herein in said State court as aforesaid the said defendant has fully submitted itself to the jurisdiction of said State court in this action and thereby has abandoned and waived any and all right which it had, if any, to a removal of the same to this court.

J. L. McDONALD,
Attorney for Plaintiff, for Above Objections Only.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

J. L. McDonald, being duly sworn, says that he is the attorney for said plaintiff in the action in the State court mentioned in the foregoing objections and has been such from the commencement thereof; that the facts stated in said objections as to the entry of judgment and appearance of said defendant therein and the making of said motion therein are true, and that said appearance of defendant is general and in no manner special or limited.

J. L. McDONALD.

Subscribed and sworn to before me this 13th day of January, A. D. 1890.

ADOLPH WISLIZENUS,
[SEAL.] *Notary Public, Ramsey County, Minn.*

Endorsed: Objections of pl'ff to jurisdiction of this court. Filed Jan'y 13th, 1891. Oscar B. Hillis, clerk.

91 United States Circuit Court, District of Minnesota.

JOHN ROBERTS
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

MARCH 31ST, 1891.

J. L. McDonald, attorney for plaintiff; J. H. Howe & S. L. Perrin, attorneys for defendant.

NELSON, *J.:*

This is a motion to remand made by the plaintiff.

The correct practice is indicated by Judge Gresham in Gould *vs.* Fuller, 36 Fed. Rep., 609.

The petition should be presented to the State court and opportunity given that court to act. In this case the petition was presented to the clerk of this court and filed by him and a certified copy immediately made and given the defendant. The court never had its attention called to the petition.

This is not the proper practice indicated by the statute granting removals from the State court as recognized by the United States Supreme Court.

Motion to remand granted.

Endorsed: Filed March 31st, 1891. Oscar B. Hillis, clerk.

92 In the Circuit Court of the United States for the District of Minnesota, Third Division.

JOHN ROBERTS, Plaintiff,
against
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendant.

It is stipulated and agreed by and between the parties to the above-entitled action, by their attorneys therein, that the clerk of said court may forthwith enter in said cause a formal judgment as of the date of the order or decision of Judge Nelson to remand said cause to the district court of Scott county, in the State of Minnesota. Said judgment shall be entered in accordance with and to carry out said order or decision, and shall be as binding on the parties in all courts and places as if entered at the same term as that at which said order or decision was made.

Nov. 4, 1891.

J. L. MACDONALD,
Plaintiff's Attorney.
JAMES H. HOWE,
Defendant's Attorney.

93 United States Circuit Court, District of Minnesota, Third Division.

Judgment Book.

JOHN ROBERTS, Plaintiff,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendant.

Plaintiff's motion to remand this cause having been argued by the attorneys for the respective parties upon January 13th, A. D. 1891, duly submitted and by the court taken under advisement—

Now, after due consideration thereof and being fully advised concerning the same, the court files its written decision sustaining and granting said motion.

Upon motion of J. L. McDonald, Esq., plaintiff's attorney, it is considered, ordered, and adjudged that this cause be, and the same hereby is, remanded to the district court of Scott county, from whence it was removed.

This judgment entered *nunc pro tunc* as of March 31st, A. D. 1891, pursuant to a stipulation signed by the attorneys for the respective parties and filed this 7th day of November, A. D. 1891.

Judgment signed this 7th day of November, A. D. 1891.

OSCAR B. HILLIS, *Clerk.*

Judgment Book, page 5.

94 UNITED STATES OF AMERICA, } *sct:*
District of Minnesota, Third Division, }

I, Oscar B. Hillis, clerk of the circuit court of the United States for the district of Minnesota, do hereby certify that I have carefully compared the foregoing paper-writing with the original thereof, which is in my custody as such clerk, and that such copy is a correct copy of such original and of the whole thereof in the cause therein named.

Witness my hand as clerk and the seal of said court. Done at my office, in Saint Paul, Minnesota, this 2nd day of January, A. D. 1892.

[SEAL.]

OSCAR B. HILLIS, *Clerk,*
By LOUISE B. TRATT, *Deputy.*

Endorsed: No. —. United States circuit court, district of Minnesota, third division. John Roberts, plaintiff, *vs.* Chicago, St. Paul, Minneapolis and Omaha Railway Co., defendant. Certified copy of the objections of plaintiff to jurisdiction of this court, order to remand, etc., stipulation concerning judgment, and judgment.

95 STATE OF MINNESOTA, } *ss:*
County of Ramsey, }

John M. Keller, being duly sworn, says that on the 2nd day of January, A. D. 1892, he served the annexed order to show cause and affidavit and exhibits thereto attached upon the appellant herein by leaving a copy of the same and each of them at the residence of Col. J. H. Howe, one of the attorneys for said appellant in this action, in the city of St. Paul, in the said county of Ramsey, between the hours of six and seven in the afternoon of said day, with a person of suitable age and discretion then resident therein, and that before so serving said papers he went to the office of the attorneys for said appellant herein, and that said office was not open so as to admit of such service and such service could not be there made.

JOHN M. KELLER.

Subscribed and sworn to before me this 4th day of January, A. D. 1892.

[SEAL.]

J. L. MACDONALD,
Notary Public, Ramsey County, Minnesota.

96 STATE OF MINNESOTA:

In Supreme Court.

JOHN ROBERTS, Respondent,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Appellant.

STATE OF MINNESOTA, *County of Ramsey,* } *ss:*

S. L. Perrin, being by me first duly sworn, says that he is one of the attorneys for the appellant in the above-entitled action, and has been an attorney of record therein throughout the entire proceedings therein; that the facts in regard to the stipulation and judgment referred to in the affidavit of J. L. MacDonald, Esq., attached to the order to show cause in this court in this case, are as follows:

The so-called motion to remand made by the plaintiff in the United States circuit court in this case was argued in the month of January, 1891, and that the same was taken under consideration by the judge of the court last named and a decision therein was not filed till about the 31st of March, 1891; that no formal order or judgment was made or entered by said court; that the only evidence of the determination of said question was a lead-pencil memorandum made by the judge of said court, which was not signed; that the attorneys for this appellant believed that under the act of Congress of March 3, 1891, the said appellant, the defendant in said cause, had a right to appeal to the Supreme Court of the
97 United States from the action of the circuit court herein, and so believing applied to the judge of said circuit court for a writ of error to the said United States Supreme Court from his decision therein, which said writ was allowed and the record in said case prepared and forwarded to the clerk of the Supreme Court, at Washington; that after the same had been filed and entered in the said Supreme Court it was discovered that no formal order or judgment had been entered pursuant to the directions of the judge who heard the case in the said circuit court on said motion to remand; whereupon the said MacDonald and this affiant agreed that the clerk should be authorized to enter a formal judgment therein as of the date of the memorandum filed by the judge of the circuit court, and in accordance therewith and for that purpose and for no other the said stipulation was made; that at the October, 1891, term of said Supreme Court the said writ was dismissed upon the ground, as stated by said court, that the said judgment was not a final judgment in said cause, and that the same was not reviewable for that reason, and that notwithstanding the provision of section 5 of the act of Congress of March 3, 1891, entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," that appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme

Court in any case in which the jurisdiction of the court is in issue, the said Supreme Court held that even if the jurisdiction of the court is in issue and passed upon by the court below, yet the
98 Supreme Court will not review the said judgment unless there is a final judgment in the case, and that there being no final judgment in said court in this case the writ of error would not lie.

(Signed) S. L. PERRIN.

Subscribed and sworn to before me this 5th day of January, A. D. 1892.

CHAS. P. NASH,
[SEAL.] *Notary Public, Ramsey County, Minn.*

Endorsed: 7144–7175. In supreme court. Jno. Roberts *v.* C., St. P., M. & O. R'y Co. Affidavit in answer to order to show cause. Filed Jan'y 5, 1892. C. P. Holcomb, clerk.

99 7144–7175.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1891.

JOHN ROBERTS, Respondent,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Appellant.

Nos. 75, 96.
Syllabus.

(2 Cases.)

When the defendant in an action in a State court filed in the office of the clerk, the court not being in session, a petition and bond for removal of the cause to the circuit court of the United States, it is also incumbent on him to direct the attention of the court to the fact.

The making of a motion to set aside a judgment on the ground that the court had not jurisdiction to render it does not give validity to the judgment, following Godfrey *v.* Valentine, 39 Minn., 336.

The validity of a judgment rendered in a State court after the cause has been removed is not affected by the subsequent remanding of the cause from the Federal to the State court.

Any contest concerning the facts alleged in the petition for removal must be determined in the Federal court.

100 7144–7175.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1891.

JOHN ROBERTS, Respondent,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Appellant.

Nos. 75, 96.
Opinion.

(2 Cases.)

This action to recover damages for a personal injury caused by the alleged negligence of the defendant was commenced in the district court of this State. Before the time for answering the complaint had expired the defendant filed in the office of the clerk of that court, in the proper county, a petition and bond for a removal of the cause to the circuit court of the United States, it being alleged in such petition that the defendant was a foreign (Wisconsin) corporation and the plaintiff a citizen of this State. No question is here presented as to the petition and bond being sufficient in form for the purposes of effecting a removal of the cause pursuant to the provisions of the law of Congress of March 3, 1875 (ch. 137), as amended by the act of August 13, 1888 (ch. 866), if the proper practice was pursued. The clerk of the district court filed the petition and bond on the first day of November, and at the request of the defendant made a certified copy of the record of the cause in the district court, which was filed in the office of the clerk of the circuit court on the third day of November, and the defendant then filed in the latter court its answer to the complaint. The time for answering expired on the following day. The petition and bond for removal were not presented to the judge of the State court, nor is it shown that his attention was called to the fact that they had been filed in the clerk's office. It appears that no notice of such filing was served upon the plaintiff.

On the seventh day of November, upon affidavit presented to the State court on the part of the plaintiff alleging the default of the defendant to appear in the action or to demur to or answer the complaint, that court proceeded in the cause as upon default. An order of reference was made, the cause was heard before the referee upon evidence presented on the part of the plaintiff, and upon the report of the referee judgment was entered against the defendant for the recovery of about twenty-two thousand dollars. A motion addressed to the district court to set aside the judgment was refused. The defendant appealed both from the order refusing to set aside the judgment and also from the judgment. Both appeals present the same questions, were argued together, and what we shall say will be equally applicable to both appeals, unless otherwise indicated.

The real question to be decided is whether by the proceedings to which we have referred the jurisdiction of the State court was sus-

pended or terminated, or, in other words, whether such pro-
101 ceedings were effectual to remove the cause from the State to the Federal court. If such was the case, then the judgment was void for want of jurisdiction and should have been set aside on motion, and the appellant should prevail in both appeals.

The respondent cannot be sustained in his contention that by the motion to vacate the defendant submitted to the jurisdiction of the court and so made valid the judgment, even though it was rendered without jurisdiction. Godfrey *v.* Valentine, 39 Minn., 336.

Nor can it effect the validity of the judgment that the case was subsequently remanded to the State court, it being considered by the circuit court that the attempted removal had not been effectual. Of course that decision of the circuit court is to be regarded as authority upon the question whether the proceedings for removal were effectual, but the remanding of the cause had no retroactive effect as respects the jurisdiction of the State court prior thereto.

The briefs contain extended arguments upon the question whether this defendant stood before our courts as a foreign or a domestic corporation, a non-resident or a resident of this State, upon which fact its right to remove the cause to the circuit court depended. The district court was not required to pass upon that question; it had no power to do so, and it is not a matter involved in these appeals. The petition for removal stated the fact to be that the defendant was a foreign corporation and non-resident of this State. No question is suggested as to the petition showing on its face, if the facts alleged were true, that the defendant was entitled to have the cause transferred to the Federal court; but the plaintiff, in effect, disputes the facts alleged in the petition. It has been settled by the decisions of the Supreme Court of the United States that where the petition, considered in connection with the record of the cause, shows facts entitling the petitioner to a removal (the law being complied with in other respects) the cause is effectually removed, and any controversy which may arise upon the facts alleged by the petition must be determined in the Federal court. Burlington, Cedar Rapids & Northern R'y Co. *v.* Dunn, 122 U. S., 513, and cases cited.

The stipulation for the entry of a judgment in the circuit court remanding the cause in accordance with the decision of that court does not affect the question here presented.

We come now to consider the more serious question whether the mere filing in the office of the clerk of the State court in vacation, or when the court is not in session, of a petition and bond—which are on their face sufficient, the petitioner doing nothing further to call the attention of the court to this fact or to invoke a suspension of the exercise of its jurisdiction—is effectual *ipso facto* to arrest or terminate that jurisdiction. Is that all that the statute contemplates? The question has arisen in the circuit courts of the United States, but the decisions have been conflicting. It will suffice to cite Osgood *vs.* Chicago, &c., R. R. Co., 2 Cent. L. J., 275; same case on re-argument, 2 Cent. L. J., 283; Shedd *vs.* Fuller, 36 Fed. R., 609, and Roberts *vs.* Chicago, St. Paul, &c., R'y Co., 45 Fed. R., 433. The

case last cited is that under consideration. It was remanded to the State court because it was considered that the mere filing of the petition and bond in the office of the clerk of the State court—the proceeding not having been brought to the attention of the judge of that court—was not effectual to transfer the cause.

102 We do not think that the question has been presented before or decided by the Supreme Court of the United States. Language may be found in the opinions of that court which, if it had been used with reference to the question here presented, would have an important bearing upon it, but, having been employed in treating of other questions, it cannot be regarded as expressing any opinion of that court upon the precise matter now before us. However, the question to be decided may be simplified by the statement of some propositions which may be regarded as settled by the decisions of that court.

The right to remove a cause into the Federal court in the cases specified in the statute is absolute, and the moving party may, by pursuing the course prescribed therein, effectually remove the cause without any consent or order or affirmative action on the part of the State court. If the petitioner complies with the requirements of the statute and states in his petition facts which, if true, show, in connection with the record of the case, that he is entitled to a removal, the jurisdiction of the State court is thereby arrested, even though that court should refuse to recognize the right of removal. Burlington, &c., R'y Co. *vs.* Dunn, *supra*; Stone *vs.* South Carolina, 17 U. S., 430; Marshall *vs.* Holmes, 141 U. S., 589; Steamship Co. *v.* Tugman, 106 U. S., 118. It is conceded in this case that no order of the State court was necessary to effect the removal. It may be added, by way of possible qualification to the broad propositions above stated, that it does not seem to have been finally determined whether the State court has any authority to pass upon the sufficiency of the bond filed by the petitioner, either as respects its amount or the sufficiency of the surety, and to refuse to accept it and to suspend the exercise of its jurisdiction if the bond should be found to be in fact insufficient; but the tendency of the decisions to which we have already referred renders it probable that it will be decided that the court has no such authority, but that if the bond is good in form its sufficiency can only be questioned and passed upon in the circuit court. In the Removal cases, 100 U. S., 457, the court declined to pass upon the question, it being found to be unnecessary; nor do we find it necessary to consider the question in this case. The bond was proper in form and the State court never considered whether it was, in fact, sufficient. For the purposes of this decision we assume that the court had no right to determine anything in respect to the bond save as to its sufficiency on its face. This being assumed, it may be stated broadly that if the attention of the State court in this case had been called to the fact of the filing of the petition and bond, and it had been moved or asked thereupon to cease to proceed in the cause, it would have been bound to do so.

The statute providing how a removal may be effected is and must

necessarily be somewhat arbitrary. Whatever it in terms requires to be done or what it is to be construed as contemplating is necessary. From the statute itself, keeping in mind the nature of the subject and the obvious purposes sought to be accomplished, we seek to discover what is required to be done by one who would avail himself of its benefits. We at once perceive that this is very briefly expressed, and the general principle of construction is not to be lost sight of, which requires that meaning and effect be given, if possible, to every expression found in the law. So, reading the
103 statute, we are inclined to the opinion that it is not enough for the moving party to merely file his petition and bond in the office of the clerk of the State court in vacation or when the court is not in session, but that he should also in some way advise the court of this proceeding before he can justly claim to have stayed or terminated the jurisdiction of that court and to have effected a removal of the cause to the Federal court.

Prior to the proceedings in question the State court had full jurisdiction in the cause. It not only had authority, but it was its duty to proceed therein to hearing and judgment. The purpose to which the statute is directed is of a double nature. It is directed to the end of arresting—terminating the jurisdiction of the State court—divesting that court of its authority to proceed, as well as of conferring upon the United States court jurisdiction in the cause. It contemplates as one of the principal ends in view that the State court shall cease to exercise its functions; but this it cannot be expected to do until in some way it is informed of the act of the party which alone divests it of its jurisdiction and converts its duty to proceed into a duty to "proceed no further in such suit;" and the language of the statute may well be regarded as disclosing the intention that the filing of the petition and bond for removal should be in some manner brought to the attention of the court in order that it might discontinue all further proceedings. Following the provision for making and filing a petition and bond in the State court, the statute declares: "It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit." It is contemplated that the court shall act intelligently upon the petition and bond, not necessarily by a formal approval of the same, if found to be sufficient upon their face, nor perhaps by the making of any formal order, but its jurisdiction and duty to proceed are not affected by the filing of any petition and bond, however defective, but only by the filing of such as are on their face legally sufficient. Burlington, &c., R'y Co. *vs.* Dunn, *supra*, page 516; Stone *vs.* South Carolina, 117 U. S., 430–432. Hence the court ought in every case to examine the petition and bond to see whether they are legally sufficient in order that if found to be so (but not otherwise) it may forbear to proceed further in the cause. The duty of the court, declared in the statute to "accept" the petition and bond (being sufficient on their face) and to cease to further exercise its functions, implies that the court is to act upon them, which it cannot do until it is advised of the fact of their being filed, nor can it act intelligently until it shall have examined the record thus made

to see whether the requirements of the law have been complied with. If it had been intended that the mere filing of the papers with the clerk, who is only a ministerial officer of the court, should be sufficient of itself to stay the proceedings of the court, why was it added to the provision for filing that the court should accept the petition and bond and cease its proceedings? This implies something more than had been expressed in the provision for filing such papers.

If the law contemplates that the proceedings for removal shall be brought to the attention of the court in order that it may thus forbear, it is reasonable to say that the moving party, the petitioner who seeks by such means to put an end to the proceedings
104 legally pending in the State court, should see to it that this is done. If he presents his petition and bond to the court and they are filed under its direction that would be sufficient; but when, as probably must be deemed permissible, he filed them with the clerk in vacation, we hold it to be necessary for him also to direct the attention of the court to the fact in order that the obvious purposes of the law may be accomplished by the suspension of further proceedings in that court. The mere filing with the clerk does not in itself inform the court of the proceedings, the record in this case illustrating how that might be done and yet the State court proceed to final judgment in the cause without any knowledge on the part of the court or of the counsel representing the adverse party that proceedings had been taken which, if effectual, had divested the court of its jurisdiction and transferred the cause to another tribunal.

We will add that our minds are not free from doubt as to the correctness of the conclusion here expressed upon the question principally discussed. However, our decision is not final, and it will doubtless be reviewed and the question settled in the court of last resort.

Judgment and order affirmed.

(Signed) DICKINSON, *J.*

I dissent.

(Signed) MITCHELL, *J.*

Endorsed: Nos. 7144 & 7175. State of Minnesota supreme court. John Roberts, respondent, *vs.* Chicago, St. P., M. & O. R'y Co., appellant. Opinion and syllabus. Filed March 8th, 1892. C. P. Holcomb, clerk. October term, A. D. 1891. Dickinson, J.

105 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1891.

TUESDAY MORNING, *January 5th, A. D.* 1892—9.30 o'clock.

Court convened pursuant to adjournment, all the justices being present.

JOHN ROBERTS, Respondent,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y CO., Appellant.
Cal. No., 75.
Reg. No., 7144.

This cause came on to be heard this day upon the order to show cause and upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

[Seal of the Supreme Court.]

A true record.

Attest: C. P. HOLCOMB, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: C. P. HOLCOMB, *Clerk.*

[Endorsed:] 7144. State of Minnesota supreme court. Copy of minutes of argument. Filed March 19, A. D. 1892. C. P. Holcomb, clerk.

106 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1891.

JOHN ROBERTS, Respondent,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.
No. 75. Appeal from District Court, Eighth Judicial District, County of Scott.

This cause having been duly argued and submitted at the general October term of this court, A. D. 1891, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below herein appealed from be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered March 19th, A. D. 1892.

By the court.

[Seal of the Supreme Court.]

Attest: C. P. HOLCOMB, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: C. P. HOLCOMB, *Clerk.*

[Endorsed:] No. 7144. State of Minnesota supreme court. Copy of order for judgment. Filed March 19, A. D. 1892. C. P. Holcomb, clerk. Entered on page 27, Book "I."

107 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1891.

JOHN ROBERTS, Respondent,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant. } No. 75.

Pursuant to an order of court duly made and entered in this cause on the 19th day of March, A. D. 1892—

It is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the eighth judicial district, sitting within and for the county of Scott, be, and the same hereby is, in all things affirmed; and it is further determined and adjudged that the respondent above named do have and recover of said Chicago, St. Paul, Minneapolis & Omaha Railway Company, appellant herein, the sum and amount of seventy-two & $\frac{50}{100}$ dollars ($72.50) costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 19th day of March, 1892.

By the court.

Attest: C. P. HOLCOMB, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	
Printer's fees	35 00
Clerk's fees, supreme court	10 75
Filing mandate and docketing transcript	1 25
Affidavits and acknowledgments	50
Postage	
Copying return for printer	
	$72 50

[Endorsed:] 7144. State of Minnesota supreme court. Transcript of judgment. Filed March 19, A. D. 1892. C. P. Holcomb, clerk. —— ——, attorney for —— ——. Page No. 379, "P" book.

STATE OF MINNESOTA, } ss:
Supreme Court, }

I, C. P. Holcomb, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Seal of the Supreme Court.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 19th day of March, A. D. 1892.

C. P. HOLCOMB, *Clerk.*

108 [Endorsed:] No. 7144. State of Minnesota supreme court. John Roberts, respondent, against Chicago, St. Paul, Minneapolis & Omaha R'y Co., appellant. Judgment-roll. Filed March 19th, 1892. C. P. Holcomb, clerk. ——— ———, attorney for ——— ———.

109 Supreme Court of the United States.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Plaintiff in Error,
vs.
JOHN ROBERTS, Defendant in Error.

The petition of the above-named Chicago, St. Paul, Minneapolis and Omaha Railway Company respectfully states and shows that the above-entitled proceeding is an action at law brought by the said John Roberts, the defendant in error above named, as plaintiff, against the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, the plaintiff in error above named, in the district court of the eighth judicial district of the State of Minnesota, the said court being a court of general jurisdiction, by the service upon said railway company on the 15th day of October, A. D. 1890, of a summons and complaint, which said service of said summons and complaint was, under the laws of the said State of Minnesota and the rules of practice in the courts of said State, the commencement of a suit of a civil nature.

That said suit was brought by the said Roberts against the said railway company to recover the sum of thirty thousand ($30,000.00) dollars as damages for a personal injury received by the said Roberts while in the employ of the said railway company on the 7th day of March, A. D. 1890, by reason of the alleged carelessness, negligence, unskillfulness, and default of the said railway company, as appears from said complaint.

110 That subsequent to the said 15th day of October, 1890, the date of service of said summons and complaint, and within twenty days thereafter and prior to the time within which the said railway company, as said defendant, was required by the laws of the State of Minnesota and the rules of the said district court to answer or plead to the complaint of the plaintiff therein, the said railway company did, on the first day of November, A. D. 1890, make and file in said court a petition in such suit, and did make and file with such petition a bond, with good and sufficient surety, as required by section three (3) of chapter eight hundred and sixty-six (866) of the Acts of the Fiftieth Congress at its first section, entitled "An act to correct the enrollment of an act approved March third, in the year of our Lord one thousand eight hundred and eighty-

seven, entitled An act to amend sections one (1), two (2), three (3), and ten (10) of an act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from the State courts, and for other purposes, approved March third, in the year of our Lord one thousand eight hundred and seventy-five," approved August thirteenth, in the year of our Lord one thousand eight hundred and eighty-eight, for the removal of the said cause into the circuit court of the United States for the district of Minnesota (third division) on the ground of the diverse citizenship of the parties to said suit.

That the said John Roberts was, at the time of the commencement of said suit and at the time the petition hereinbefore named was filed in said district court of the State of Minnesota, a citizen of the State of Minnesota and an inhabitant thereof, and that the said Chicago, St. Paul, Minneapolis and Omaha Railway Com-
111 pany was at said times a citizen of the State of Wisconsin, having its principal office and place of business at Hudson, in the last-named State, and was a non-resident of said State of Minnesota, which said facts more fully appear in the petition for removal hereinbefore referred to, and the same are uncontroverted.

That the bond filed with said petition was conditioned as required by law for the entering by the defendant in the said circuit court of the United States for the district of Minnesota on the first day of its then next session a copy of the record of such suit and to pay all costs that might be awarded by the said circuit court if said court should hold that such suit was wrongfully or improperly removed thereto.

That said railway company as such defendant did, at or before the then next session thereof and on the third day of November, A. D. 1890, enter in the said circuit court of the United States for the district of Minnesota a copy of the record in such suit, and on the said day filed in said circuit court its answer in said cause.

The petitioner further shows that subsequent to the filing of the said petition and bond for the removal of said cause from said district court of the State of Minnesota to the circuit court of the United States for the district of Minnesota and subsequent to the filing by the said defendant, the said railway company, of a copy of the record in said suit and subsequent to the filing of the answer in said suit in said circuit court the said plaintiff, John Roberts, by his attorney in said cause, did, on the 6th day of November, A. D. 1890, make an affidavit of default in said district court, and did procure to be signed by the judge of said court an order of
112 reference therein, empowering the referee in and by said order to hear, try, and determine the said cause and to report and order judgment therein, and further ordering that upon the filing of the report of said referee judgment be entered in accordance with the referee's report; that the said referee did hear the testimony of witnesses and did, on the 4th day of December, A. D. 1890, file his findings as said referee, and upon said findings the clerk of said district court of the State of Minnesota did, on the 5th day of December, A. D. 1890, enter in said cause a judgment in favor of the

plaintiff, John Roberts, and against the defendant, said railway company, for the sum of twenty-two thousand and ten dollars and sixty cents ($22,010.60).

That thereafter and within the time limited by law therefor the said railway company did appeal from the said judgment to the supreme court of the State of Minnesota in due form of law, with the necessary bond, as required by the statutes of said State and the rules of practice therein, alleging that the said district court had erred in allowing the default and appointing a referee and entering a judgment in said cause after the said Chicago, St. Paul, Minneapolis and Omaha Railway Company had filed its petition and bond in the said district court to remove the said cause into the said circuit court of the United States for the district of Minnesota because the said district court had proceeded "further in such suit" after the said railway company had made and filed said petition; that the said cause was afterward heard, tried, and determined in said supreme court and a judgment therein rendered in favor of John Roberts and against the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, in and by which said judgment the said supreme court of the State of Minnesota,
113 the same being the court of last resort in said State, did decide against the validity of said removal of said cause from said district court to the said circuit court of the United States and did decide against the right, privilege, and immunity specially set up and claimed by said Chicago, St. Paul, Minneapolis and Omaha Railway Company under said statute of the United States approved August thirteenth, in the year of our Lord one thousand eight hundred and eighty-eight, hereinbefore set forth; that said judgment is a final judgment by the court of last resort of the said State of Minnesota and is a good and valid judgment under said decision of said court unless the same is reversed.

Wherefore said Chicago, St. Paul, Minneapolis and Omaha Railway Company prays that a writ of error may be allowed, directed to the honorable the judges of the supreme court of the State of Minnesota, commanding them, under their seal, distinctly and openly, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, that said record and proceedings may be inspected, and that the said Supreme Court of the United States may cause further to be done therein to correct any error and to do what of right and according to the laws and customs of the United States should be done.

J. H. HOWE & S. L. PERRIN,
Att'ys for Petitioner.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y CO.,
By E. W. WINTER, *General Manager.*

On reading the foregoing petition and approving the bond the writ prayed for is allowed this 22nd day of March, 1892.

(Sig.) JAMES GILFILLAN,
Chief Justice Supreme Court of Minnesota.

114 STATE OF MINNESOTA, } ss:
County of Ramsey, }

E. W. Winter, being duly sworn, says that he is the general manager & an officer of The Chicago, St. Paul, Minneapolis & Omaha Railway Company, the defendant herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge.

E. W. WINTER.

Subscribed and sworn to before me this 19th day of March, A. D. 1892.

S. L. PERRIN,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

Endorsed: Filed March 22d, 1892. C. P. Holcomb, clerk.
[Endorsed:] United States supreme court, —— county. Ch'go, St. Paul, Mpls. & Omaha R'y Co., pl'ff in error, *vs.* John Roberts, def't in error. Petition for writ of error from judgment. Due and personal service of the within is hereby admitted this — day of ——, 189–. —— ——, att'y for ——. (Copy.) J. H. Howe & S. L. Perrin, attorneys for pl'ff in error, St. Paul, Minn.

115 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Roberts, plaintiff, and Chicago, St. Paul, Minneapolis and Omaha Railway Company, defendant, wherein was drawn in question the validity of a treaty or statute or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this be-

half, do command you, if judgment be therein given, that
116 then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 21st day of April, A. D. 1892, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid be- inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 22d day of March, in the year of our Lord one thousand eight hundred and ninety-two.

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States
for the Dist. of Minnesota,
By LOUISE B. TROTT, *Deputy.*

Allowed by—

JAMES GILFILLAN,
Chief Justice of the Supreme Court
of the State of Minnesota.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

117 [Endorsed:] 7144. U. S. Supreme Court. Chicago, St. Paul, Minneapolis & Omaha R'y Co., pl'ff in error, ag'st John Roberts, def't in error. Writ of error on judgment. Filed March 22, 1892. C. P. Holcomb, clerk.

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to John Roberts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in Washington, in the District of Columbia, on the 21st day of April, 1892, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein The Chicago, St. Paul, Minneapolis and Omaha Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James Gilfillan, chief justice of the supreme court of the State of Minnesota, this 22d day of March, in the year of our Lord one thousand eight hundred and ninety-two.

JAMES GILFILLAN,
Chief Justice, Supreme Court of Minnesota.

119 [Endorsed:] 7144. U. S. Supreme Court. Chicago, St. Paul, Minneapolis & Omaha R'y Co., pl'ff in error, *vs.* John Roberts, def't in error. Citation on error from judgment. Service of the within citation is hereby admitted this 22d day of March, 1892. J. L. Macdonald, attorney for said def't in error, John Roberts. Citation with proof of service. Filed March 24, 1892. C. P. Holcomb, clerk.

120 Supreme Court of the United States.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Plaintiff in Error,
vs.
JOHN ROBERTS, Defendant in Error.

Know all men by these presents that we, Chicago, St. Paul, Minneapolis and Omaha Railway Company, a corporation duly created, organized, and existing under and by virtue of the laws of Wisconsin, as principal, and E. W. Winter and Henry P. Upham, of St. Paul, in the county of Ramsey and State of Minnesota, as sureties, are held and firmly bound unto John Roberts, of Scott county, Minnesota, in the full and just sum of thirty thousand dollars ($30,000.00), to be paid to the said John Roberts, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, the said Chicago, St. Paul, Minneapolis and Omaha Railway Company doth hereby bind itself, its successors and assigns, and the said sureties do hereby bind themselves, their heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with the corporate seal of said company and with the seals of said sureties and dated this 19th day of March, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a session of the supreme court of the State of Minnesota, in a suit depending in said court between John Roberts,
121 plaintiff therein, and the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, *was* defendant therein, a final judgment was rendered against the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, and the said Chicago, St. Paul, Minneapolis and Omaha Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said John Roberts, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the 16th day of April, A. D. 1892:

Now, the condition of the above obligation is such that if the said Chicago, St. Paul, Minneapolis and Omaha Railway Company shall prosecute said writ of error to effect and answer all costs and damages if it fail*t* to make its plea good and shall pay the whole amount of said judgment, with just damages for delay and costs

and interest on appeal, then the above obligation to be void; else to remain in full force and virtue.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA R'Y CO.,
(Sig.) By E. W. WINTER, *Its General Manager.*

Countersigned:

[Corporate Seal.]

(Sig.) E. E. WOODMAN, *Secretary.*
(Sig.) E. W. WINTER. [SEAL.]
(Sig.) HENRY P. UPHAM. [SEAL.]

Signed, sealed, and delivered in presence of—
S. L. PERRIN.
H. P. BARLOW.

122 STATE OF MINNESOTA, } ss:
County of Ramsey, }

On this 19th day of March, A. D. 1892, before me personally appeared E. W. Winter, and he, being by me duly sworn, did say that he is the general manager of the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, and that he executed the foregoing instrument for and on behalf of said corporation, and that the said instrument is the free act and deed of said corporation.

Also personally appeared before me the said E. W. Winter and Henry P. Upham, to me personally known, who, being by me duly sworn, did say that they are the persons who executed the foregoing instrument and acknowledged that they executed the same freely and voluntarily for the purposes therein expressed.

[NOTARIAL SEAL.] S. L. PERRIN,
Notary Public, Ramsey County, Minnesota.

STATE OF MINNESOTA, } ss:
Ramsey County, }

E. W. Winter and Henry P. Upham, to me personally known to be the persons who executed the foregoing instrument as sureties, came before me personally and, being duly sworn, did each for himself say that he is a resident and freeholder of the State of Minnesota, and that he is worth the sum of thirty thousand dollars, ($30,000.00) exclusive of his debts and liabilities, in property not exempt by law from seizure and sale on execution.

E. W. WINTER.
HENRY P. UPHAM.

Subscribed & sworn to before me this 19th day of March, 1892.

S. L. PERRIN,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

123 [Endorsed:] U. S. Supreme Court. Ch'go, St. Paul, Mpls. & Omaha R'y Co., pl'ff in error, *vs.* John Roberts, def't in error. Supersedeas bond on appeal from judgment. The within bond is approved and a supersedeas is allowed and all proceedings in said supreme & district courts are hereby stayed. (Sig.) James Gilfillan, chief justice supreme court of Minnesota. (Copy.) J. H. Howe & S. L. Perrin, att'ys for pl'ff in error.

124 United States Supreme Court.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Plaintiff in Error,
vs.
JOHN ROBERTS, Defendant in Error.

Assignments of Error.

Comes now the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, plaintiff in error above named, and assigns the following errors in said cause:

First. That the said State court did err in allowing a default and making an order of reference in said cause.

Second. That said State court did err in taking testimony and making findings and entering a judgment in said cause.

Third. That said State court did err in proceeding further in said cause after said plaintiff in error, the defendant below, had filed its petition and bond for the removal of said cause into the circuit court of the United States.

Fourth. That said State court did err in refusing to vacate and set aside said judgment.

Fifth. That said State court did err in assuming jurisdiction of said cause for any purpose whatever after the petition and bond of the plaintiff in error, the defendant below, had been filed in said State court.

Sixth. That said State court did err in making an order of reference, taking testimony, and entering a judgment against the defendant below, the plaintiff in error here, without notice to said defendant or plaintiff in error, after it had appeared in said cause, by presenting and filing in said court a petition and bond for the removal of said cause into the circuit court of the United States.

125 Seventh. That said State court did err in exercising jurisdiction in said cause in that it decided against the right, privilege, and immunity specially set up by the defendant below, the plaintiff in error here, under the statute and authority of the United States, of its removal and right to remove said cause from said State court into said circuit court of the United States.

J. H. HOWE &
S. L. PERRIN,
Att'ys for Pl'ff in Error.

Endorsed: Filed March 22nd, 1892. C. P. Holcomb, clerk.

126 [Endorsed:] U. S. Supreme Court. Ch'go, St. Paul, Mpls. & Omaha R'y Co., pl'ff in error, *vs.* John Roberts, def't in error. Assignments of error. Copy.

127 State of Minnesota Supreme Court.

STATE OF MINNESOTA, } *ss:*
Office of Clerk of Supreme Court, }

I, C. P. Holcomb, clerk of said supreme court, do hereby certify and return that the foregoing and attached papers are a full, correct, and complete copy of all the papers on file in my office in the action therein entitled and of the whole thereof; also the original citation and proof of service thereof and original writ of error and assignments of error to the Supreme Court of the United States, and the same constitutes and is the full and complete return to the writ of error issued and allowed in said cause.

Seal of the Supreme Court, State of Minnesota.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 13th day of April, A. D. 1892.

C. P. HOLCOMB,
Clerk of Supreme Court, State of Minnesota.

[Endorsed:] No. —. Chicago, St. Paul, Minneapolis & Omaha R'y Co., pl'ff in error, *v.* John Roberts, def't in error. Writ of error to judgment sup. c't of Minnesota.

Endorsed on cover: Case No. 15,024. Minnesota supreme court. Term No., 394. The Chicago, St. Paul, Minneapolis & Omaha Railway Company, plaintiff in error, *vs.* John Roberts. Filed April 22, 1892.

164-703-704

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~395~~. 112 15

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN ROBERTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED APRIL 22, 1892.

(15,025.)

(15,025.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 395.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN ROBERTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1891.

JOHN ROBERTS, Respondent,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

No. 96. Appeal from District Court, Eighth Judicial District, County of Scott.

This cause having been duly argued and submitted at the general October term of this court, A. D. 1891, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the court below herein appealed from be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered March 19th, A. D. 1892.

By the court.

[Seal of the Supreme Court.]

Attest: C. P. HOLCOMB, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: C. P. HOLCOMB, *Clerk.*

[Endorsed:] No. 7175. State of Minnesota supreme court. Copy of order for judgment. Filed March 19, A. D. 1892. C. P. Holcomb, clerk. Entered on page 28, Book "I."

104 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1891.

JOHN ROBERTS, Respondent,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

No. 96.

Pursuant to an order of court duly made and entered in this cause on the 19th day of March, A. D. 1892—

It is here and hereby determined and adjudged that the order of the court below, herein appealed from, to wit, of the district court of the eighth judicial district, sitting within and for the county of Scott, be, and the same hereby is, in all things affirmed; and it is further determined and adjudged that the respondent above named do have and recover of said Chicago, St. Paul, Minneapolis & Omaha Railway Company, appellant herein, the sum and amount of thirty-seven & $\frac{50}{100}$ dollars ($37.50) costs and disbursements in

this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 19th day of March, 1892.

By the court.

Attest: C. P. HOLCOMB, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	
Printer's fees	
Clerk's fees, supreme court	10 75
Filing mandate and docketing transcript	1 25
Affidavits and acknowledgments	50
Postage	
Copying return for printer	
	$37 50

[Endorsed:] 7175. State of Minnesota supreme court. Transcript of judgment. Filed March 19, A. D. 1892. C. P. Holcomb, clerk. —— ——, attorney for —— ——. Page No. 380, "P" book.

STATE OF MINNESOTA, *Supreme Court,* } ss:

I, C. P. Holcomb, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Seal of the Supreme Court.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 19th day of March, A. D. 1892.

C. P. HOLCOMB, *Clerk.*

105 [Endorsed:] No. 7175. State of Minnesota supreme court. John Roberts, respondent, against Chicago, St. Paul, Minneapolis & O. R'y Co., appellant. Judgment-roll. Filed March 19, 1892. C. P. Holcomb, clerk. —— ——, attorney for —— ——.

106 Supreme Court of the United States.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Plaintiff in Error,
vs.
JOHN ROBERTS, Defendant in Error.

The petition of the above-named Chicago, St. Paul, Minneapolis and Omaha Railway Company respectfully states and shows that

the above-entitled proceeding is an action at law brought by the said John Roberts, the defendant in error above named, as plaintiff, against the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, the plaintiff in error above named, in the district court of the eighth judicial district of the State of Minnesota, the said court being a court of general jurisdiction, by the service upon said railway company on the 15th day of October, A. D. 1890, of a summons and complaint, which said service of said summons and complaint was, under the laws of the said State of Minnesota and the rules of practice in the courts of said State, the commencement of a suit of a civil nature.

That said suit was brought by the said Roberts against the said railway company to recover the sum of thirty thousand ($30,000.00) dollars as damages for a personal injury received by the said Roberts while in the employ of the said railway company on the 7th day of March, A. D. 1890, by reason of the alleged carelessness, negligence, unskillfulness, and default of the said railway company, as appears from said complaint.

107 That subsequent to the said 15th day of October, 1890, the date of service of said summons and complaint, and within twenty days thereafter and prior to the time within which the said railway company, as said defendant, was required by the laws of the State of Minnesota and the rules of the said district court to answer or plead to the complaint of the plaintiff therein, the said railway company did, on the first day of November, A. D. 1890, make and file in said court a petition in such suit, and did make and file with such petition a bond, with good and sufficient surety, as required by section three (3) of chapter eight hundred and sixty-six (866) of the Acts of the Fiftieth Congress at its first session, entitled "An act to correct the enrollment of an act approved March third, A. D. one thousand eight hundred and eighty-seven, entitled 'An act to amend sections one (1), two (2), three (3), and ten (10) of an act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from the State courts, and for other purposes,' approved March third, A. D. one thousand eight hundred and seventy-five," approved August thirteenth, A. D. one thousand eight hundred and eighty-eight, for the removal of the said cause into the circuit court of the United States for the district of Minnesota (third division) on the ground of the diverse citizenship of the parties to said suit.

That the said John Roberts was, at the time of the commencement of said suit and at the time the petition hereinbefore named was filed in said district court of the State of Minnesota, a citizen of the State of Minnesota and an inhabitant thereof, and that the said Chicago, St. Paul, Minneapolis and Omaha Railway Com-

108 pany was at said times a citizen of the State of Wisconsin, having its principal office and place of business at Hudson, in said last-named State, and was a non-resident of said State of Minnesota, which said facts more fully appear in the petition for removal hereinbefore referred to, and the same are uncontroverted.

That the bond filed with said petition was conditioned as required

by law for the entering by the defendant in the said circuit court of the United States for the district of Minnesota on the first day of its then next session a copy of the record of such suit and to pay all costs that might be awarded by the said circuit court if said court should hold that such suit was wrongfully or improperly removed thereto,

That said railway company as such defendant did, at or before the then next session thereof and on the third day of November, A. D. one thousand eight hundred and ninety, enter in the said circuit court of the United States for the district of Minnesota a copy of the record in such suit, and on the said day filed in said circuit court its answer in said cause.

The petitioner further shows that subsequent to the filing of the said petition and bond for the removal of said cause from said district court of the State of Minnesota to the circuit court of the United States for the district of Minnesota and subsequent to the filing by the said defendant, the said railway company, of a copy of the record in said suit and subsequent to the filing of the answer in said suit in said circuit court the said plaintiff, John Roberts, by his attorney in said cause, did, on the sixth day of November, A. D. one thousand eight hundred and ninety, make an affidavit
109 of default in said district court, and did procure to be signed by the judge of said court an order of reference therein, empowering the referee in and by said order to hear, try, and determine the said cause and to report and order judgment therein, and further ordering that upon the filing of the report of said referee judgment be entered in accordance with the referee's report; that the said referee did hear the testimony of witnesses and did, on the fourth day of December, A. D. one thousand eight hundred and ninety, file his findings as said referee, and upon said findings the clerk of said district court of the State of Minnesota did, on the fifth day of December, A. D. one thousand eight hundred and ninety, enter in said cause a judgment in favor of the plaintiff, John Roberts, and against the said defendant, said railway company, for the sum of twenty-two thousand and ten dollars and sixty cents ($22,010.60).

That thereafter and on the thirtieth day of December, A. D. one thousand eight hundred and ninety, the said railway company, defendant in said suit, by its attorney, presented to the district court of said eighth judicial district an affidavit, setting forth, among other things, the citizenship of the parties, the filing of said petition and bond, the entering of said suit in said circuit court and filing by defendant, its answer therein and the proceedings upon which the judgment hereinbefore referred to *were* based, whereupon the judge of said court made and entered an order in said cause staying all proceedings and ordering the plaintiff to show cause, on the third day of January, A. D. one thousand eight hundred and ninety-one, why judgment should not be vacated and set aside; that at the hearing thereof the plaintiff, to show cause why said judgment should not be set aside, read the affidavit of his attorney and
110 of the clerk of said district court, stating, among other things, the date of the affidavit of default by him made and the

entry of judgment pursuant to such affidavit and claiming that neither the said plaintiff nor his attorney had notice of the removal of said cause or of the filing of the petition and bond for removal referred to, and that the same was clandestinely and secretly filed in the office of the clerk of said court without the knowledge of the plaintiff, and that the same was not presented or submitted to the judge of the district court, and that said cause was removed without the knowledge or consent of said district court or of the judge thereof or the procurement of any order of such removal; that the district court was not open on the first day of November, A. D. one thousand eight hundred and ninety, the date when said petition and bond were filed, and that the judge of said court was absent from said county of Scott and was then in the village of Glencoe, in the county of McLeod, in the State of Minnesota.

That upon said hearing the said district court made an order in said cause reciting that after having duly considered the matter the court is of the opinion that at the time of the entry of the judgment in said action the same was pending in the said district — of Scott county and had not been removed to the circuit court of the United States, and that defendant was in default as for want of an answer, and that said judgment was duly rendered in said action, and the order to show cause hereinbefore referred to was thereupon discharged.

That the said district court decided upon said hearing, as expressed from memorandum of opinion filed by the judge thereof, that the petition and bond for removal had not been pre-
111 sented to the judge of said district court, and that the cause was never removed from the district court of Scott county; that said decision of said district court drew in question a statute of the United States and the said decision was against the right, privilege, and immunity specially set up and claimed by the said railway company under the statute of the United States, hereinbefore referred to, of August thirteenth, A. D. one thousand eight hundred and eighty-eight.

That thereafter and within the time required by law the said railway company duly appealed from said decision to the supreme court of the State of Minnesota, which said supreme court is the court of last resort in said State and the highest judicial tribunal therein, and the said cause was, in due course and by proper proceedings, heard, tried, and determined in and by said supreme court, and the decision of said district court was sustained and a final judgment in said cause was duly and seasonably entered in favor of the plaintiff, said John Roberts, and against the defendant in said cause, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, and that said judgment is now upon its face a valid judgment against said railway company in favor of said plaintiff and may be executed to the damage of the defendant therein.

That the said supreme court in said opinion, decision, and judgment did decide that the said cause had not been removed from the said district court of the State of Minnesota into the circuit court of the United States, and in such decision did draw in question the

statute of the United States, hereinbefore referred to, of August thirteenth, A. D. one thousand eight hundred and eighty-eight, and the said decision is against the right, privilege, and immunity
112 specially set up and claimed by the said Chicago, St. Paul, Minneapolis and Omaha Railway Company under the said statute, to wit, its right and privilege to remove said cause from said State to said circuit court and its immunity from the trial of causes in a State court in cases in which it had, under said statute, the right of removal from said State to said circuit court.

Wherefore your petitioner prays that a writ of error may be allowed, directed to the honorable the judges of the supreme court of the State of Minnesota, commanding them, under their seal, distinctly and openly, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, that said record and proceedings may be inspected, and that the said Supreme Court of the United States may cause further to be done therein to correct any error and to do what of right and according to the laws and customs of the United States should be done.

J. H. HOWE & S. L. PERRIN,
Att'ys for Petitioner.
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y CO.,
By E. W. WINTER, *General Manager.*

On reading the foregoing petition and approving the bond the writ prayed for is allowed this 22nd day of March, 1892.
(Sig.) JAMES GILFILLAN,
Chief Justice Supreme Court of Minnesota.

113 STATE OF MINNESOTA, } ss:
County of Ramsey, }

E. W. Winter, being duly sworn, says that he is the general manager & an officer of The Chicago, St. Paul, Minneapolis & Omaha Railway Company, the defendant herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge.

—— ——.

Subscribed and sworn to before me this 19th day of March, A. D. 1892.

S. L. PERRIN,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

Endorsed: Filed March 22nd, 1892. C. P. Holcomb, clerk.

[Endorsed:] United States supreme court, —— county. Ch'go, St. Paul, Mpls. & Omaha R'y Co., pl'ff in error, *vs.* John Roberts, def't in error. Petition for writ of error — judgment affirming order. Due and personal service of the within is hereby admitted this — day of ——, 189–. —— ——, att'y for ——. (Copy.) J. H. Howe & S. L. Perrin, attorneys for pl'ff in error, St. Paul, Minn.

114 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Roberts, plaintiff, and Chicago, St. Paul, Minneapolis and Omaha Railway Company, defendant, wherein was drawn in question the validity of a treaty or statute or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that
115 then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 21st day of April, A. D. 1892, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid be- inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 22d day of March, in the year of our Lord one thousand eight hundred and ninety-two.

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States
for the Dist. of Minnesota,
By LOUISE B. TROTT, *Deputy.*

Allowed by—
JAMES GILFILLAN,
Chief Justice of the Supreme Court
of the State of Minnesota.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

116 [Endorsed:] 7175. U. S. Supreme Court. Chicago, St. Paul, Minneapolis & Omaha R'y Co., pl'ff in error, ag'st John

Roberts, def't in error. Writ of error on judgment affirming order. Filed March 22, 1892. C. P. Holcomb, clerk. J. H. Howe & S. L. Perrin, att'ys for pl'ff in error.

117 UNITED STATES OF AMERICA, *ss:*

The President of the United States to John Roberts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in Washington, in the District of Columbia, on the 21st day of April, 1892, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein The Chicago, St. Paul, Minneapolis and Omaha Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James Gilfillan, chief justice of the supreme court of the State of Minnesota, this 22d day of March, in the year of our Lord one thousand eight hundred and ninety-two.

JAMES GILFILLAN,
Chief Justice of Supreme Court of Minnesota.

118 [Endorsed:] 7175. U. S. Supreme Court. Chicago, St. Paul, Minneapolis & Omaha R'y Co., pl'ff in error, *vs.* John Roberts, def't in error. Citation on error from order. Service of the within citation is hereby admitted this 22d day of March, 1892. J. L. Macdonald, attorney for said def't in error, John Roberts. Filed March 24, 1892. C. P. Holcomb, clerk.

119 Supreme Court of the United States.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Plaintiff in Error,
vs.
JOHN ROBERTS, Defendant in Error.

Know all men by these presents that we, Chicago, St. Paul, Minneapolis and Omaha Railway Company, a corporation duly created, organized, and existing under and by virtue of the laws of Wisconsin, as principal, and E. W. Winter and Henry P. Upham, of St. Paul, in the county of Ramsey and State of Minnesota, as sureties, are held and firmly bound unto John Roberts, of Scott county, Minnesota, in the full and just sum of thirty thousand dollars ($30,000.00), to be paid to the said John Roberts, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, the said Chicago, St. Paul, Minneapolis and Omaha Railway Company doth hereby bind itself, its successors and assigns, and the said sureties do hereby bind themselves, their heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with the corporate seal of said company and with the seals of said sureties and dated this 19th day of March, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a session of the supreme court of the State of Minnesota, in a suit depending in said court between John Roberts, plaintiff therein, and the said Chicago, St. Paul, Minneapolis
120 and Omaha Railway Company, *was* defendant therein, a final judgment was rendered against the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, and the said Chicago, St. Paul, Minneapolis and Omaha Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said John Roberts, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the 16th day of April, A. D. 1892:

Now, the condition of the above obligation is such that if the said Chicago, St. Paul, Minneapolis and Omaha Railway Company shall prosecute said writ of error to effect and answer all costs and damages if it fail to make its plea good and shall pay the whole amount of said judgment, with just damages for delay and costs and interest on appeal, then the above obligation to be void; else to remain in full force and virtue.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA R'Y CO.,

(Sig.) By E. W. WINTER, *Its General Manager.*

Countersigned:

[Corporate Seal.]

(Sig.) E. E. WOODMAN, *Secretary.*
(Sig.) E. W. WINTER. [SEAL.]
(Sig.) HENRY P. UPHAM. [SEAL.]

Signed, sealed, and delivered in presence of—
S. L. PERRIN.
H. P. BARLOW.

121 STATE OF MINNESOTA, } ss:
County of Ramsey, }

On this 19th day of March, A. D. 1892, before me personally appeared E. W. Winter, and he, being by me duly sworn, did say that he is the general manager of the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, and that he executed the foregoing instrument for and on behalf of said corporation, and that the said instrument is the free act and deed of said corporation.

Also personally appeared before me the said E. W. Winter and Henry P. Upham, to me personally known, who, being by me duly sworn, did say that they are the persons who executed the foregoing instrument and acknowledged that they executed the same freely and voluntarily for the purposes therein expressed.

[NOTARIAL SEAL.] S. L. PERRIN,
Notary Public, Ramsey County, Minnesota.

STATE OF MINNESOTA, } ss:
Ramsey County, }

E. W. Winter and Henry P. Upham, to me personally known to be the persons who executed the foregoing instrument as sureties, came before me personally and, being duly sworn, did each for himself say that he is a resident and freeholder of the State of Minnesota, and that he is worth the sum of thirty thousand dollars ($30,000.00), exclusive of his debts and liabilities, in property not exempt by law from seizure and sale on execution.

E. W. WINTER.
HENRY P. UPHAM.

Subscribed & sworn to before me this 19th day of March, 1892.

S. L. PERRIN,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

122 [Endorsed:] U. S. Supreme Court. Ch'go, St. Paul, Mpls. & Omaha R'y Co., pl'ff in error, ag'st Jno. Roberts, def't in error. Supersedeas bond on appeal from order. The within bond is approved and a supersedeas is allowed and all proceedings in the supreme & district courts are hereby stayed. (Sig.) James Gilfillan, chief justice supreme court of Minnesota. (Copy.) J. H. Howe & S. L. Perrin, att'ys for pl'ff in error.

123 United States Supreme Court.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Plaintiff in Error,
vs.
JOHN ROBERTS, Defendant in Error.

Assignments of Error.

Comes now the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, plaintiff in error above named, and assigns the following errors in said cause:

First. That the said State court did err in allowing a default and making an order of reference in said cause.

Second. That said State court did err in taking testimony and making findings and entering a judgment in said cause.

Third. That said State court did err in proceeding further in said cause after said plaintiff in error, the defendant below, had filed its petition and bond for the removal of said cause into the circuit court of the United States.

Fourth. That said State court did err in refusing to vacate and set aside said judgment.

Fifth. That said State court did err in assuming jurisdiction of said cause for any purpose whatever after the petition and bond of the plaintiff in error, the defendant below, had been filed in said State court.

Sixth. That said State court did err in making an order of reference, taking testimony, and entering a judgment against the defendant below, the plaintiff in error here, without notice to said defendant or plaintiff in error, after it had appeared in said cause, by presenting and filing in said court a petition and bond for the removal of said cause into the circuit court of the United States.

124 Seventh. That said State court did err in exercising jurisdiction in said cause in that it decided against the right, privilege, and immunity specially set up by the defendant below, the plaintiff in error here, under the statute and authority of the United States, of its removal and right to remove said cause from said State court into said circuit court of the United States.

J. H. HOWE &
S. L. PERRIN,
Att'ys for Pl'ff in Error.

Endorsed: Filed March 22d, 1892. C. P. Holcomb, clerk.

125 [Endorsed:] U. S. Supreme Court. Ch'go, St. P., Mpls. & Omaha R'y Co., pl'ff in error, *vs.* Jno. Roberts, def't in error. Assignments of error. Copy.

126 State of Minnesota Supreme Court.

STATE OF MINNESOTA, } ss:
Office of Clerk of Supreme Court, }

I, C. P. Holcomb, clerk of said supreme court, do hereby certify and return that the foregoing and attached papers are a full, correct, and complete copy of all the papers on file in my office in the action therein entitled and of the whole thereof; also the original citation and proof of service thereof and original writ of error and assignments of error to the Supreme Court of the United States, and the same constitutes and is the full and complete return to the writ of error issued and allowed in said cause.

Seal of the Supreme Court, State of Minnesota.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 13th day of April, A. D. 1892.

C. P. HOLCOMB,
Clerk of Supreme Court, State of Minnesota.

127 Supreme Court of the United States, October Term, 1894.

THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Pl'ff in Error, *vs.* JOHN ROBERTS. } No. 395. In Error to the Supreme Court of the State of Minnesota.

As the transcript of the record filed herein up to and including page 103 thereof is identical with the transcript of the record in the case between the same parties and numbered No. 394 on the docket

of this court for the October term, 1894, it is hereby stipulated by counsel for the respective parties that pages 1 to 103, inclusive, of the transcript of the record in the above-entitled cause may be omitted in printing.

THOMAS WILSON,
Counsel for Pl'ff in Error.
J. L. MACDONALD,
Counsel for Def't in Error.
THOMAS ——.

128 [Endorsed:] Case No. 15,025 Supreme Court U. S., October term, 1894. Term No., 395. The Chicago, St. Paul, Minneapolis & Omaha Railway Co., P. E., *vs.* John Roberts. Stipulation to omit portion of record in printing. Filed March 14, 1895.

[Endorsed:] No. —. Chicago, St. Paul, Minneapolis & Omaha R'y Co., pl'ff in error, *v.* John Roberts, def't in error. Writ of error on order sup. c't, Minnesota.

Endorsed on cover: Case No. 15,025. Minnesota supreme court. Term No., 395. The Chicago, St. Paul, Minneapolis and Omaha Railway Company, plaintiff in error, *vs.* John Roberts. Filed April 22d, 1892.

164-703-704

Office Supreme Court U.S.
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CLERK

164-703-704

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 111-112.

THE LAW ASSOC... OF PHILADELPHIA

THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOHN ROBERTS,

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Brief of Plaintiff in Error.

THOMAS WILSON,
Attorney for Plaintiff in Error.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 111-112.

THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOHN ROBERTS,

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Brief of Plaintiff in Error.

BRIEF OF FACTS.

But one record is printed in these two cases as they present a single question. The facts are as follows:

The plaintiff below, Roberts, commenced a suit against this plaintiff in error in the district court of Minnesota for Scott county, by serving a summons and complaint on it on the 15th day of October, 1890.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 111-112.

THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,

Plaintiff in Error,

vs.

JOHN ROBERTS,

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Brief of Plaintiff in Error.

BRIEF OF FACTS.

But one record is printed in these two cases as they present a single question. The facts are as follows:

The plaintiff below, Roberts, commenced a suit against this plaintiff in error in the district court of Minnesota for Scott county, by serving a summons and complaint on it on the 15th day of October, 1890.

The complaint charged that the defendant was, for the purposes of the action, "a domestic corporation of the state of Minnesota, under and pursuant to the laws thereof," and that he, while in its employ as a fireman upon one of its locomotives, received personal injuries because of the "defective and negligent construction and location of its tracks and water tank," and claimed damages in the sum of thirty thousand dollars. Record, pp.1-4.

On the first day of November, 1890, and before the time to answer the complaint had expired, the defendant filed with the clerk of the state court in which the action was pending, a petition and bond for the removal of the case to the circuit court of the United States. Record, pp. 4-6.

There is no question as to the sufficiency in matter of substance or form of the petition or bond.

The petition states that the defendant railroad company was, at the time of the commencement of the suit, and up until and at the time of the filing of the petition, a corporation of the state of Wisconsin, and a citizen of that state, and that the plaintiff was, during those times, a citizen of the state of Minnesota. Record, pp. 4-5.

The clerk of the state court filed the petition and bond and made a duly certified copy thereof, and of the record in the case up to that time, and delivered the same to the defendant; and it delivered them to the clerk of the circuit court of the United States for the district of Minnesota, by whom they were filed in the latter court on the 3rd day of November, 1890.

The plaintiff, notwithstanding the filing of such petition and bond, caused a default to be entered in the state court against the defendant, and without notice to it, and without its knowledge, procured an assessment of damages by a referee, and thereupon caused judgment to be entered in said state court against the defendant on the 5th day of December, 1890, for the sum of $22,010.60. Record, p. 26.

That judgment, on appeal, was affirmed by the supreme court of Minnesota, (Record, pp. 52-56. Ib., p. 58) and the case is here on a writ of error issued out of this Court to review that judgment.

The second case presents merely another phase of the same litigation.

On learning of the entry of judgment in the state court, as aforesaid, the defendant presented to the judge of an adjoining district an affidavit setting forth the commencement of suit in the state court, the steps taken,as aforesaid,to remove it to the federal circuit court, the entry of judgment thereafter in the state court without notice or knowledge of the defendant,and that said judgment was liable to be enforced,and the defendant's property levied on and sold to satisfy it. On that affidavit the judge ordered the plaintiff in that suit to show cause why that judgment should not be vacated and set aside —(Record, pp. 35-37); but on the hearing he discharged said order and denied the motion to set aside the judgment stating as a ground of his decision that the "presentation of a proper petition and bond *to the state court* is a jurisdictional pre-

requisite." Record, pp. 40-41.

On appeal the supreme court of Minnesota affirmed that order and a writ of error was issued out of this court to review that judgment of the supreme court.

The decision of the supreme court in both cases (which were considered as one case) is reported in 48 Minn., at page 521, 523, and is printed in this record at page 52-56.

Two facts are to be noted:

(1) Until after the entry of judgment the defendant had no notice or knowledge of *the proceedings in the state court subsequent to the filing of the petition and bond* for the removal of the case. (Record page 36.)

(2) It is not pretended that the plaintiff, when *these proceedings* were had, had not notice of the steps taken for the removal of the case. The attorney for plaintiff made an affidavit stating "that said plaintiff and this deponent *did not have or receive any notice from said defendant of the filing of the petition for removal* and bond mentioned in said affidavit, *and that the same was clandestinely and secretly filed in the office of the clerk of said court, without the knowledge of or any notice to said plaintiff or said deponent*, and that a certified copy of the same, and the then record of said action, was made, and the same filed in the office of the clerk of the circuit court of the United States, as stated in said affidavit, without said petition or bond being in any manner presented or sub-

mitted to the judge of said court; and that said petition and bond was so filed, and said certified copy of the same and of said record made, as stated in said affidavit, without the knowledge or consent of said court or judge thereof, or the procurment of any order thereon from said court" (Record pp. 37-8.) but it will be seen that he does not deny that he had notice and knowledge of the steps taken to remove the case *when he proceeded to assess the damages of the plaintiff and to enter judgment in said court.*

As shown by its opinion the supreme court of Minnesota affirmed the judgment and the order of the lower court, solely on the ground "that it was not enough for the moving party to merely file his petition and bond in the office of the clerk of the state court in vacation or when the court was not in session, but that he should also, in some way, advise the court of this proceeding, before he can justly claim to have stayed or terminated the jurisdiction of that court," (48 Minn. 531); and that "if he (the party petitioning for the removal) presents his petition and bond to the court, and they are filed under its direction, that would be sufficient; but when, as probably must be deemed permissible, he files them with the clerk in vacation, we hold it to be necessary for him to direct the attention of the court to the fact, in order that the obvious purposes of the law may be accomplished by the suspension of farther proceedings in that court."

Record, pp. 52-56.

The correctness of this ruling is the only question in these cases.

ERRORS ASSIGNED.

1. The district court of Minnesota, in which this suit was pending, erred in refusing to accept the petition and bond filed in said court for the removal of said cause, and in proceeding farther in said suit, and the supreme court of Minnesota erred in sustaining that ruling and action.

2. The district court of Minnesota erred in entering judgment in said suit against the defendant railroad company, after the filing of said petition and bond.

3. The supreme court of Minnesota erred in affirming said judgment of said district court.

4. The district court of Minnesota erred in denying the motion of the defendant railroad company to set aside said judgment.

5. The supreme court of Minnesota erred in affirming the said order denying said motion.

6. The supreme court of Minnesota erred in holding and adjudging that the jurisdiction of the district court was not suspended or terminated by the filing in said district court of said petition and bond.

7. The supreme court of Minnesota erred in holding and adjudging that in order, in such case,

to suspend or terminate the jurisdiction of the district court, during vacation, or while said court was not in session, it was necessary not only to file the petition and bond with the clerk of said court, but also, in some way, to advise the court thereof.

8. The supreme court of Minnesota erred in affirming each of said judgments of said district court.

BRIEF OF ARGUMENT.

I.

If an action is removable, the statute makes the removal complete upon the filing of the proper petition and bond in the state court.

Stone v. South Carolina, 117 U. S. 430, 432.
Kern v. Heidekooper, 13 Otto (103 U. S.) 485.
Marshall v. Holmes, 141 U. S. 589, 595.
Steamship Co. v. Tugman, 106 U. S. 118, 122.
Crehoar v. O. &c., R. R. Co., 131 U. S. 240, 243-244.
Wilson v. W. U. Tel. Co., 34 Fed. 561, 562.
Dillon on Removal of Causes, (5th ed.) sec. 143.
Osgood v. R. R. Co. 2 Cent. Law Journal, 273, 283.
Connor v. Scott, 4 Dillon, 242.
Willis v. Balt. & O. Ry. Co. 65 Fed. 532.

II.

While no order or action of the state court is necessary as a condition precedent to the transfer of the jurisdiction, in such a case, yet, inasmuch as that court has a right to decide for itself, as a matter of law "whether on the face of the record a removal has been affected" and to proceed in the suit if it decides this question in the negative, it is prudent and proper practice for the moving party, when practicable to make an application to that court for a ruling and order that proceedings in the suit shall be by it suspended.

Bur. R. R. Co. v. Dunn, 122 U. S. 513, 516.
Stone v. South Carolina, supra.
Wilson v. W. U. Tel. Co., supra.

BUT TO HOLD THAT SUCH MOTION IS A CONDITION PRECEDENT TO THE REMOVAL, WOULD NOT ONLY BE CONTRARY TO THE PLAIN LETTER AND SPIRIT OF THE STATUTE, BUT IN MANY CASES WOULD DEPRIVE THE PARTY ENTITLED THERETO OF THE RIGHT OF REMOVAL.

The removal must be effected, if at all, before the time to answer expires, within twenty days after the commencement of the action whether the court be in session or not.

And as the application is to be made to the *court*, not to the *judge* manifestly that would often be impossible before the time to answer expired; nor would the difficulty be obviated or lessened if an application to the *judge* was sufficient, for not infrequently he is not only absent from the district, but absent from the state. And it cannot be presumed that the framers of this statute pro-

viding for the removal of causes, imposed conditions or limitations on the exercise of the right that would often make it impracticable or impossible.

Nor would the practice contended for benefit any one. *If the case is removable* and the petition and bond are in compliance with the statute, a state court has no power to retain jurisdiction; *if not* it has no power to transfer it. And it would be an act neither of courtesy nor comity to appeal to the court for that which it is denied the power to give or refuse. Nor can it be held that such application is necessary or proper as notice of the removal, for a court is presumed to, and as a matter of fact in practice *does* take notice of its own records. And it would be absurd to require notice to be served on the judge. That would be not only contrary to all precedent, but often ineffectual, as it is well known that the judge before whom such steps may be taken is often not the judge before whom the case is tried.

III.

The filing of the petition and bond with the clerk is a "filing in the court."

Bouvier's Law Dict. "File."
Hunter v. Caldwell, 10 Q. B. 69.
Gorham v. Summers, 25 Minn. 81.
Green v. Garrington, 16 Ohio St. 548.

IV.

The bond in this case was, in all respects, sufficient; and no objection having been made thereto, (see opinion of supreme court of Minnesota in this case) even if it was open to objection, that has been waived.

Ayers v. Watson, 113, U. S. 598-599.

Martin v. B. & O. R. R. Co., 151 U. S. 688, 689.

V.

All issues of fact made upon the petition for removal in such case must be heard in the circuit court.

Stone v. South Carolina, supra.

Bur. R. R. Co. v. Dunn, 122 U. S. 513.

K. C. &c. R. R. Co. v. Dougherty, 128 U. S. 298.

THOMAS WILSON,
Attorney for Plaintiff in Error.

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All issues of fact made upon the petition for removal in such case must be heard in the circuit court.

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THOMAS WILSON,
Attorney for Plaintiff in Error.

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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NOS. 14 AND 15.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN ROBERTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR, ON RE-ARGUMENT.

THOMAS WILSON,
ATTORNEY FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NOS. 14 AND 15.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN ROBERTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR, ON RE-ARGUMENT.

The time to answer, and, therefore, the time within which an application for removal could be made, expired in this case November 4th, 1890. The petition and bond were filed November 1st. (Record 6, 7, 31–33.) The certified copy of the Record, including the petition and bond with the answer of the defendant, was filed in the United States Circuit Court at St. Paul, November 3rd. (p. 35.)

To obtain a certified copy of the Record it became necessary for the defendant to file with the Clerk of the State Court the copy of the summons and complaint served on it, as the plaintiff had not filed the original; but, of course, he cannot take advantage of his own

wrong or be heard to allege the use of the copies as error, and the correctness of the copy of the Record transmitted to the United States Circuit Court is unquestioned. So far as the defendant is concerned it cannot be questioned but that whatever it did was done regularly, openly and fairly, and unless it can be held to have been necessary for it as an indispensible condition precedent to make application directly to the Judge constituting the Court, or in open Court, everything necessary to effect the removal was by it done legally.

As to the conduct and practice of the plaintiff: His attorney, *on November 6th*, made an affidavit, "that said defendant has not answered or demurred to said complaint and has not appeared in said action in any manner and is wholly in default therein," and prayed that plaintiff's damages should be assessed by "reference to said action to some person, which referee may be authorized to report a judgment." (p. 8.) On the next day the Judge of that Court, as it appears, signed an order "that said action be referred to John L. Townley, Esq., to hear, try and determine the same, and to report a judgment, and that upon the filing of the report judgment should be entered by the Clerk." (pp. 8 and 9.)

On November 20th the referee made affidavit before the plaintiff's attorney that he would faithfully perform his duties. (p. 9.) On December 4th the referee ordered that judgment should be entered in favor of the plaintiff for Twenty-one Thousand, Nine Hundred Five (21,905) Dollars and costs, amounting in all to Twenty-two Thousand Ten and 60-100 (22,010.60) Dollars, for which sum judgment was entered on December 5th. (pp. 22, 26.)

Up until after the judgment was entered the defendant had no notice or knowledge of any of those proceedings subsequent to the steps taken to remove the case. (p. 26.)

Neither the affidavit of default, the order of reference, the report of the referee, nor any other paper authorizing or referring to such reference, was filed or recorded in the office of the Clerk of the State Court until the entry of that judgment. Perhaps the reason why those papers were withheld from the records and files of the court may be found in the following Statute of Minnesota, viz.: "*When any order or decision shall be filed in any cause the Clerk of the Court wherein it is filed shall immediately give notice in writing by mail or personally thereof to the attorneys of record in such case.*" Statutes of Minnesota, 1894, Sec. 5388; Gen. Session Laws 1889, Chap. 154, Sec. 1.

We forbear to comment on the affidavit of default

further than to call attention to the fact that the affiant—plaintiff's attorney—does not state that he or the plaintiff had not notice or knowledge when he made that affidavit and obtained the Judge's signature to the order of reference, of the steps before taken for the removal of the case. That he had then such knowledge is tacitly admitted. The affidavit on its face, and by its guarded language, shows this. (37–38.) Its language is: "That the said plaintiff and this deponent did not have or receive any notice *from said defendant* of the filing of such petition for removal and bond mentioned in said affidavit, and the same was clandestinely and secretly filed in the office of the Clerk of said Court without the knowledge of or notice to said plaintiff or said deponent." But we do not contend that the acts referred to, however subject they may be to comment, are in and of themselves ground for reversal. They do not present a federal question. We only refer to them at this point because from the questions asked by some members of this Court on the last hearing we infer that they desired to be informed as to the circumstances under which the removal was attempted or effected and the judgment obtained. We do not, nevertheless, think them wholly irrelevant, as they may throw some light on the consequences of the construction of the removal acts contended for by plaintiff's counsel.

The question presented by this case is one of general and great importance, namely: *Is a direct personal application to the Judge that constitutes the State Court, or in open Court, in all cases an essential condition precedent to the transfer of the jurisdiction?* We admit that it is proper practice to apply to the State Court for an order in all such cases when it is practicable, not because such an order is necessary to terminate the jurisdiction of the State Court or confer jurisdiction on the Federal Court, but as an acknowledgement or record evidence of the acquiescence of that Court in the transfer. The defendant is thus informed that no further steps will be taken in that Court. While that Court has no right to determine whether the case *shall be removed*, it undoubtedly has the right to determine for itself whether the Record shows that it *has been removed*, and if it decides that question in the negative, to proceed with the trial. Our contention is that such an application or order is not an essential condition precedent to the removal, and that this conclusion is not only deducible from the language of the Statute, but that any other construction would in many cases deprive a defendant of the rights which the removal statutes were intended to secure.

Suppose—what we have a right to suppose, for it *may* be true, though we are not at liberty to assert it as the fact in this case, it not appearing in the Record—that the Judge of the District in which a suit is pending, before the petition and bond for removal are filed in the Court is stricken with a mortal illness, and that neither he nor any other Judge holds a term of Court, general or special, in that District until after the time to answer expires. In such case, if the position of the plaintiff in this suit be tenable, the defendant is without his fault deprived of the right to remove. If such an application is jurisdictional, it matters not that it may be impracticable or impossible, the result would be that in all such cases the defendant is, without his fault, denied this right, for, as said by this Court in *R. R. Co.* vs. *Dougherty*, 138 U. S., 298, "It is imperative that the application to remove must be made when the answer is due." See also, *Dougherty* vs. *Western Union Tel. Co.*, 61 Fed., 138–140.

If this is the law, an attorney so disposed could bring his suit at a time and place that would in many cases make impossible such application by the defendant before the time to answer expired.

A foreign corporation can be sued in any County in the State of Minnesota. Statutes of Minnesota for 1894, Sec. 5,200.

In some of the Counties,—and this is true of the most of the recently organized or sparsely settled States—there is but one term a year, and in many there are but two, and there are many Counties in a Judicial District. As a matter of necessity and by operation of law, the Court in one County is adjourned before or at the time fixed by law for the beginning of the term in another. This Court will take judicial notice, too, that it is usual for a Judge each year to take a vacation for a few weeks, when he may be, and not infrequently is, absent from his District and State. If a suit was begun at the commencement of such a vacation, or when the Judge was necessarily in another County, or too ill to attend to business, no removal would ordinarily be possible, for in Minnesota and in many other States the defendant must answer within twenty days whether the Court is in session or not.

We submit that unless the language of the removal Statute necessarily requires a construction involving such consequences it will not be presumed that it was intended by Congress. These objections are not obviated by the Statute cited *in part* by plaintiff's counsel. (Plaintiff's Brief p. 35.) See also Statutes of Minn. for 1894, Vol. 2, Sec. 5,388. The reason for the enactment of that statute and its meaning are obvious.

In sparsely settled States or localities where regular or general terms of the Court are held at distant intervals of time, it is necessary, in order to prevent inconvenience, to confer on the Court the power to hold special terms at such times as may be proper and convenient, and at such special terms to transact business not requiring the presence of a jury—proper notice of such terms being given. But this does not go to the absurd length of declaring that the Court is open whenever and wherever the Judge may be found; whether in his sick chamber, on the highway without his District, without the State or in the absence of the Clerk and without notice of the time and place of such sitting. This Section is not essentially different from Section 638 of the Revised Statutes of the United States providing that the Circuit Courts, as Courts of Equity, shall be deemed always open for certain purposes.

The language of the Removal Act is: "*Any suit of a civil nature * * * may be removed by the defendant or defendants therein.*" The option, or election, is given to the defendant (if the case is removable) or perhaps it might be more accurate to say that on the declaring of his election in the manner prescribed the law makes the removal.

Section 3 of the act declares the manner in which he shall proceed, as follows: "Whenever any party entitled to remove any suit mentioned in the next preceding section * * * may desire to remove such suit * * * *he may make and file a petition in such suit in such State Court* * * * and *shall make and file therewith a bond* * * *. *It shall then be the duty of the State Court to accept said petition and bond and proceed no further* in such suit." The petition could only be filed in the State Court by filing it with the Clerk.

But for the use of the words "*to accept said petition and bond,*" there would not be a shadow of justification or excuse for the contention that any action of the State Court should, as a matter of jurisdiction, be invoked, and, read in connection with the context, we respectfully submit that those words do not justify such contention. The word "accept" may imply affirmative or positive action, or merely acquiescence, and we think it is clearly here used in the latter sense. If it is intended by these words to require, as a condition to the transfer of the jurisdiction, that the State Court shall do some affirmative act, then, of course, the jurisdiction would not be transferred unless or until that act was done, and the remedy in case of refusal to act would be by mandamus to compel action. But it will hardly be claimed that a writ of mandamus could be obtained or is necessary in such a case.

It is not reasonable to suppose that Congress intended that that Court could directly or indirectly, by action or non-action, take away or limit the right given a defendant be cause of its supposed possible prejudice or unconscious bias, or that an application to that Court is jurisdictional, when it is conceded—as every well considered case does concede—that upon such application the case is removed—the petition and bond being filed—without any word, action or even volition on part of such Court, or even if it should make an order denying the application. It is not a matter of either comity or courtesy to apply to a Court for that which the law has not conferred on it the power or right to either give or deny. Nor can it plausibly be claimed that such application is necessary or proper *as a notice*, for if notice were required it would not only be unprecedented, but ineffectual, to give it to the Judge. *A Court is presumed to, and in practice does, take notice of its own record.* That is the only proper method of giving notice to the Court. In this case notice to the Judge would have been ineffectual for any purpose, for it will not be denied that he died soon after the filing of the petition, and before any term of Court, general or special, was held in that County; and this Court will take judicial notice of the fact that in cities as a rule there are numerous Judges in the same District, and until the commencement of the term at which the case is tried it is unknown which shall try any given case or class of cases, and, therefore, notice to the Judge who presided when the application for the removal was made would not, in the majority of cases, be notice to the Judge presiding at the trial. If the intent had been to require notice of such removal, the Statute would have required it to be given to the attorney of the adverse party, and clearly this is not required. And it would be most unprecedented and unreasonable to hold that a substantial right should be withheld or denied for the failure to give a notice, the giving of which could not benefit, or the failure to give prejudice, any one, and which it would, in many instances, be impossible to give.

Whether the language of the Statute, therefore, or the object and purpose, or the consequence, be considered, we think it must be held to mean that upon the filing of a proper petition and bond (in a removable case) the law makes the removal, and that it therefore becomes the duty of the State Court to accept the situation, acquiesce in the removal, and proceed no further in the case.

See in addition to the cases cited in our Brief on the first hearing:

Wilson vs. *W. U. Tel. Co.*, 34 Fed., 561-2;

Noble vs. *Mass. Benevolent Ass'n.*, 48 Fed., 337;

which is a carefully considered case, and

Osgood vs. *Ry. Co.*, 2 Cent Law Journal, 273, 283-4;

before cited, which is also reported in 6 Bissell, 330.

Dillon on Removal of Causes, 5 Ed., Sec. 143-147.

The law on this point is accurately stated by Justice Field in *Wilson* vs. *Western Union Tel. Co.*, *supra*, as follows: "The Statute makes the removal upon the filing of the petition with the necessary bond," and by Chief Justice Waite, speaking for this Court, in *Stone* vs. *South Carolina*, as follows:

"A State Court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer. * * * It is undoubtedly true, as was said in *Steamship Company* vs. *Tugman*, 106 U. S. 118, 122, that upon the filing of the petition and bond—the suit being removable under the Statute—the jurisdiction of the State Court absolutely ceases, and that of the Circuit Court of the United States immediately attaches, but still, as the right of removal is statutory, before a party can avail himself of it, he must show upon the Record that his is a case which comes within the provision of the Statute. As was said in *Insurance Company* vs. *Pechner*, 95 U. S., 183, 185, "his petition for removal when filed becomes a part of the Record in the cause. It should state facts, which, when taken in connection with such as already appear, entitle him to the transfer. If he fails in this he has not, in law, shown to the Court that it cannot 'proceed further with the suit.' Having once acquired jurisdiction, the Court may proceed until it has been judicially informed that its power over the cause has been suspended." The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the Record, and the necessary security having been given, the power of the State Court in the case ends and that of the Circuit Court begins.

All issues of fact made upon the petition for removal must be tried in the Circuit Court, but the State Court is at liberty to determine for itself whether, on the face of the Record, a removal has been effected." 117 U. S. 432.

And by Justice Harlan, delivering the opinion of this Court in *Crehore* vs. *Ohio &c. Ry. Co.*, 131 U. S., 243-4: "Upon the the filing by either party, or by any one or more of the plaintiffs or defendants 'entitled to remove any suit,' mentioned in the first or second sections of the act of March 3, 1875, 18 Stat. 470, of the petition and bond required by its third section, 'it shall *then* be the duty of the State Court to accept said petition and bond, and proceed no further in such suit.' The effect of filing the required petition and bond in a removable case is, as said in *Railroad Co.* vs. *Mississippi*, 102 U. S., 135, 141, that the State Court is thereafter 'without jurisdiction' to proceed further in the suit; or in *Railroad Co.* vs. *Koontz*, 104 U. S., 5, 14, its rightful jurisdiction comes to 'an end;' or, in *Steamship Co.* vs. *Tugman*, 106 U. S. 118, 122, 'upon the filing, therefore, of the petition and the bond—the suit being removable under the Statute—the jurisdiction of the State Court absolutely ceased, and that of the Circuit Court of the United States immediately attached.' It has, also, been repeatedly held, particularly in *Stone* vs. *South Carolina*, 117 U. S. 430, 432, following substantially *Railroad Co.* vs. *Koontz*, that 'a State Court is not bound to surrender its jurisdiction of the suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer;' and that 'the mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the Record, and the necessary security having been given, the power of the State Court in the case ends, and that of the Circuit Court begins.' These decisions were in line with *Insurance Co.* vs. *Pechner*, 95 U. S., 183, 185, arising under the judiciary act of 1789 in which it was held that a 'petition for removal when filed becomes a part of the Record in the cause;' that the party seeking the removal should state 'facts which, taken in connection with such as already appear, entitle him to transfer;' and that 'if he fails in this, he has not, in law, shown to the Court that it cannot' proceed further with the cause."

It thus appears that a case is not, in law removed from the State Court upon the ground that it involves a controversy between citizens of different States, unless, at the time the application for removal is made, the Record, upon its face, shows it to be one that is removable. We say upon its face, because 'the State Court is only at liberty to enquire whether, on the face of the Record, a case has been made which requires it to proceed no fur-

ther;' and 'all issues of fact made upon the petition for removal must be tried in the Circuit Court.'"

That this is a removable action is clearly presented by the petition, (pp. 31,33) which is conclusively presumed to be true until the contrary is established, and that issue can only be tried in the United States Circuit Court; and of course it could not be tried until that Court had acquired jurisdiction of the case. If that Court obtained jurisdiction, the State Court lost it, and plaintiff's judgment was illegal. That, therefore, is not a question in this case. But even if that was an open question, it would admit of but one answer.

Under the Constitution of Minnesota, Art. 10, Sec. 2, the legislature could not by special act create a corporation or make this plaintiff a domestic corporation, and it is not competent for the legislature to deny to a foreign corporation the right to remove suits against it into the Federal Court.

Moore vs. *Omaha Ry. Co.*, 21 Fed. 817;
Home Ins. Co. vs. *Morse*, 20 Wall., 445;
Doyle vs. *Ins. Co.*, 94 U. S. 535;
Chap. 219, Special Laws of Minn., 1881, p. 779;
Chap. 362, Special Laws of Minn., 1881, p. 916;
Chap. 228, Special Laws of Minn., 1881, p. 793;
C., M. & St. P. Ry. vs. *Becker*, 32 Fed., 849;
Dillon on Removal of Causes, 5 Ed., Sec. 10-11;
So. Pac. Ry. vs. *Denton*, 146 U. S. 202, 206-7.

That the bond in this case is sufficient can not be, and we believe it is not, pretended.

THOMAS WILSON,
Attorney for the Plaintiff in Error.

164-703,704

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164-703-704

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1895.

Nos. 111-112.

THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
Plaintiff in Error,

vs.

JOHN ROBERTS,
Defendant in Error.

Brief of Defendant in Error.

J. L. MACDONALD,
Attorney for Defendant in Error.

W. A. DAY,
Of Counsel.

H. L. COLLINS CO., PRINTERS, ST. PAUL.

SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1895.

TERM NOS. 111 AND 112.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,

Plaintiff in Error,

vs.

JOHN ROBERTS,

Defendant in Error.

(TWO CASES.)

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF OF DEFENDANT IN ERROR, UPON BOTH CASES.

CONCISE STATEMENT.

This case is brought into this court by two writs of error; one from the order and decision of the State Supreme Court, affirming the *judgment* rendered herein by the State District Court, and the other is from the order and decision of that Supreme Court affirming the *order* of the State District Court *denying the motion of defendant* (plaintiff in error here)

to have that judgment vacated and set aside. The points involved are practically the same, and, by agreement of counsel, are submitted together.

This is an attempt, on the part of the plaintiff in error, to secure a reversal of those decisions of the Supreme Court of Minnesota, upon the sole ground that at the time that judgment was rendered by the state court, this action had been removed to the Federal court.

There are several reasons why this should not be done; but it is believed that before stating them, the following concise statement of the proceedings heretofore had in this action in both the State and Federal courts will materially aid this court in its consideration of the points presented, and in understanding the present status of the case:

1. This action was commenced in the District Court in and for the County of Scott, Eighth Judicial District, and State of Minnesota; by the service of the summons (Record page 1) and complaint (p. p. 1, 2, 3) therein by the sheriff of that county upon the defendant (plaintiff in error), on the 15th day of October, 1890, (p. 1) by delivering a true copy of said summons and complaint to its acting agent, as provided by law.

This was then, and now, the manner provided by the Statutes of Minnesota, which authorizes the commencement of an action in this way, or by, in the first instance, filing the complaint with the clerk of the court and issuing and serving the summons alone.

When, as in this case, the summons and complaint are *both* served upon the defendant, the plaintiff is not required *to file* the original summons or com-

plaint with the clerk until subsequent proceedings render this necessary. Hence the original summons and complaint herein were not filed with the clerk until filed by the referee with his report, as hereinafter stated.

2. The said Eighth Judicial District of the State of Minnesota, (of which the said County of Scott, where the judgment herein for damages was rendered is a part) then, and ever since, has consisted of the counties of Carver, Le Sueur, McLeod, Scott and Sibley (Gen. Stat. Minn. 1878, chap. 64, sec. 48), and that during all of the time of all the proceedings herein in the State court the judge thereof resided and had his chambers at Glencoe, in said county of McLeod.—Page 39.

3. The twenty days, within which plaintiff in error was to answer the complaint herein, having expired, and it having not answered or demurred to the same or appeared in the action in any manner, and being wholly in default (page 8), the proper affidavit of default (p. p. 7 and 8) was made by the attorney for the plaintiff (defendant in error here), and the same, with said summons and complaint and proof of service thereof, was presented to the judge of that (state) court and district at Glencoe, in said McLeod county, who thereupon, on the 7th day of November, 1890, made the order of reference (p. p. 8 and 9) referring the case to the referee therein named "to hear, try and determine the same and to report a judgment herein," which the clerk was thereupon to enter, and all of said papers were thereupon delivered to said referee.

4. The District Courts of Minnesota are, (wherever the judge thereof may be found therein), *always*

open for the transaction of such business, and making such orders as removing cases to the federal courts (Gen. Stat. 1878, chap. 66, sec. 244, hereinafter cited), and had full authority (Ibid, chap. 66, sec. 247) to so refer this case to the referee herein.

5. On the 20th day of November, 1890, the said referee qualified and began the hearing of this case and the taking of testimony herein, and continued the same from day to day until the 29th day of November, 1890, when the taking of testimony was closed.

After considering the proofs and allegations, the referee found in favor of this defendant in error (p. p. 18 to 22) and reported and ordered the judgment entered herein.—Page 26.

6. On the *5th day of December, 1890*, the said report of the referee, together with the said *original complaint and summons* and affidavit of default, oath of referee and order of reference were duly filed in the office of the Clerk of said District court (of the state), and pursuant, and in obedience to the order of said court and the order of said referee, *judgment was duly entered* in favor of defendant in error (p. 26) as found and ordered by said referee.

7. This defendant in error (plaintiff below) alleged in his *complaint* herein (p. 12) as a fact material to him and his rights against plaintiff in error in this action, as follows:

> "That said defendant is, and for more than one year last past has been, a corporation duly organized under and pursuant to the laws of the State of Wisconsin, and was duly authorized *by the laws of the State of Minnesota* to acquire, own and operate the railroads hereinafter named, *and it was, and is, for the purpose of this action a do-*

mestic corporation of the State of Minnesota, under and pursuant to the said laws thereof."

In support of that allegation and as a portion of the evidence received by said referee, this defendant in error (p. 17-18) introduced in evidence the laws of Minnesota above referred to, and among them chapter 219 of the Special Laws of the State of Minnesota for the year 1881, a copy of which is attached to the said report of the referee (p. p. 22-23), marked Exhibit "A," and made a part thereof.

It will be seen that that chapter 219 (as expressed in its title) is "an act to authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company (plaintiff in error) to *acquire*, construct, maintain and operate railroads in the State of Minnesota," and that the concluding proviso and *condition upon which* those rights and franchises *were granted to plaintiff in error*, is (p. 123-124) as follows:

"—and provided further, that in all suits and proceedings upon causes of action *arising in this state* in which the said Chicago, St. Paul, Minneapolis & Omaha Railway shall be a party, it shall be deemed to be, *for all purposes, a domestic corporation, and not otherwise.*"

8. This defendant in error also then offered in evidence with said laws granting plaintiff in error the said rights and franchises, the resolution of the Board of Directors of plaintiff in error (p. p. 23-24) accepting each of said acts of the legislature of the State of Minnesota, adopted on the 21st day of April, 1881, in and by which said plaintiff in error accepted said legislation and acts. That resolution, minus the preamble specifying each of said acts, is (p. p. 24-25) as follows:

"Resolved, That the Chicago, St. Paul, Minneapolis & Omaha Railway Company hereby ac-

cepts the several acts of the State of Minnesota hereinabove referred to, and the rights, powers, privileges, franchises and immunities granted and conferred by each of said acts, *subject to the limitations, restrictions, and conditions in each of said acts contained.*"

9. It was shown (p. p. 16, 17, 18) that the railroad upon which the defendant in error was injured and for which he recovered damages in the judgment, was so acquired and owned and operated by plaintiff in error as a portion of the Western Division of the Chicago, St. Paul, Minneapolis & Omaha Railway, and that before it was acquired by plaintiff in error it was known as, and was the St. Paul & Sioux City Railroad, the railroad of that name mentioned in chapter 228 of the Special Laws of Minnesota for the year 1881 entitled "An act to authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company to purchase, own and operate the St. Paul and Sioux City Railroad and its proprietary or connecting roads, and to issue stock and bonds thereon."

10. Notwithstanding said condition upon which plaintiff in error was authorized to and did acquire the railroad upon which this defendant in error was injured, to-wit: that it was, as to this class of cases, a *domestic* corporation, the attorney for plaintiff in error, on the 1st day of November, 1890, went to the office of the Clerk of said State Court in and for said County of Scott, and (see affidavit of the deputy clerk, p. p. 38-39) filed in that office the said copy, summons and complaint herein, which had been so served upon plaintiff in error, and the so-called "petition" for and bond for removal, copies of which are to be found on pages 4, 5, 6 and 7, and that he then, on the same day, and as soon as he had filed

said *copies* of the summons and the complaint herein and said petition and bond for removal, he had the deputy clerk make copies of said *copies* and petition and bond for removal as copies of the "record;" and on the *same day* (p. 32-33) and, *without submitting the matter to the State Court, or even calling the attention* of the judge thereof to it, and without notice to or the knowledge of defendant in error, filed these certified copies with the clerk of the circuit court as a transcript of the "record" of the State court, in the Federal circuit court.

11. On the 30th day of December, 1890, said plaintiff in error *appeared* without limitation in this action, *in said State court*, and upon the affidavit of one of its attorneys of record therein (p. p. 34, 35, 36 and 37), and procured from Hon. Henry G. Hicks, one of the judges of the Fourth judicial district, and County of Hennepin, (the city of Minneapolis being nearer the county seat of Scott county than said Glencoe, and there being a state statute allowing this to be done), an order requiring this defendant in error to show cause before said last named judge at the city of Minneapolis, on the 3d day of January, 1891, why the said judgment entered in said district court should not be vacated and set aside. This order also stayed all proceedings in the action on the part of this defendant in error pending that motion. Page 36-7.

That order to show cause was heard by said Judge Hicks upon the affidavits contained in pages 34 to 39, and arguments of counsel, and taken under advisement; and on April 13, 1891, (p. p. 39-40) said order to show cause was discharged and the motion to vacate said judgment denied.

12. The plaintiff in error having caused this action to be placed upon the calendar of January, 1891, term of the United States circuit court for the district of Minnesota, this defendant in error, by his attorney, appeared *specially* thereat on the 13th day of January, 1891, (p. p. 46-47) and objected to the jurisdiction of said circuit court to take cognizance of, consider, or hear, try, or determine said action, for the reasons (1) said action was not then and never had been in that court, (2) said action had been commenced in the district court in and for the County of Scott, and has never been removed therefrom, and (3) that judgment had theretofore been duly rendered and entered therein in said State court against said defendant (plaintiff in error), (4) and that within the past fifteen days and *since the filing of the pretended record* in said circuit court, it (plaintiff in error) had *appeared in said State court* and moved said State court to have said judgment entered therein vacated and set aside, and that said *appearance* in said State court *was general* and in no manner limited; and (5) that by making said motion in said State Court, plaintiff in error had voluntarily submitted itself to the jurisdiction of the State court and waved all right which it had, if any, to a removal of the cause to the Federal court.

Those objections were fully argued by counsel and taken under advisement, and on March 31st, 1891, the circuit court decided (p. p. 47, 48; and 45 Fed. 433) that the circuit court had not acquired jurisdiction of it and ordered the action *remanded* to the *State court*.

13. From that decision of the circuit court remanding the case the plaintiff in error appealed to

this court, and at the October, 1891, term that appeal was, on motion of defendant in error, *dismissed*, this court holding that an appeal could not be taken from that order remanding the case to the State court. *C., St. P., M. & O. Ry. Co. vs. Roberts, 141 U. S. 690.*

14. After that last mentioned appeal to this court from that remanding order had been taken, and while the same was pending here, these parties stipulated (p. 48) that *judgment might be entered* in said circuit court on said order remanding said cause to the State court, and that

> "said *judgment shall be entered* in accordance with and TO CARRY OUT SAID DECISION, and shall be as binding on the parties, *in all courts and places*, as if entered at the same term as that at which said order or decision was made,"

and judgment was (on application of plaintiff in error) so entered in the circuit court.

15. On the 14th day of April, 1891, the plaintiff in error appealed (p. p. 27-28) from said *judgment* rendered and entered herein to the Supreme court of the State of Minnesota, and at the same time also appealed to said *State* Supreme court from the *order* of said State court made by Judge Hicks, refusing to vacate and set aside that judgment.

16. On the 19th day of March, 1892, the said State Supreme court rendered its decisions (p. p. 58-59 in No. 394, and page 1 in No. 395) affirming both the said *judgment* and *order* of the State court appealed to it as hereinbefore stated.

17. On the 22d day of March, 1892, plaintiff in error procured writs of error from this court to the said Supreme court for the review of both of said decisions affirming said judgment and said order of the

State court, and both of these cases are now here for the consideration of this court.

Case No. 184 involves the decision affirming the *judgment*, and No. 182 involves the decision affirming the order refusing to vacate the judgment. It will be seen that they present substantially the same points and questions.

We, therefore, claim that both these cases and writs of error should be dismissed for want of jurisdiction in this court for the following reasons:

First. The order and decision of the circuit court remanding this case to the State court is *final* and conclusive.

Second. That said filing of papers by plaintiff in error with the clerk of the State court (without *submitting them in any way to the State court* or judge thereof), and having copies of the papers so filed *at once made* and filed in the circuit court, was not what is required by the act of congress and did not remove the case or suspend the jurisdiction of the State court, and was a contempt of said State court.

Third. That *after* that *attempted* removal the plaintiff in error *voluntarily appeared* in the State court (by making that motion before Judge Hicks to vacate the judgment) and thereby submitted itself to the jurisdiction of the *State* court, and waived all right to claim that this case had been *removed* to the Federal court.

Fourth. That plaintiff in errer had no right and was not, and is not, entitled to have this action removed to the Federal court. That, by *its own stipulation* with the state, it is, for the purposes of this action, (and all actions upon causes of action arising

in the state of Minnesota), to be deemed to be, and is, a *domestic* corporation of that state and not otherwise.

Fifth. The record does not show a case for removal.

We will consider these points in the order stated.

POINTS AND AUTHORITIES.

FIRST.

THE COURT HAS NO JURISDICTION OF THIS CASE,

BECAUSE THE ORDER OF THE CIRCUIT COURT REMANDING THIS CASE TO THE STATE COURT IS FINAL AND NOT REVIEWABLE HERE.

This case and writ of error must be dismissed (1) because this court has *no jurisdiction* to hear and consider this question; and (2) because it is *res adjudicata*, that this action was *not* removed from the State court and has been, for that reason, remanded by the proper Federal court to the State court, from which it was attempted to be removed.

The facts as to this point are, as stated by this court in its opinion dismissing the first writ of error in this case from said decision of the (U. S.) circuit court (141 U. S. 690) remanding this case to the State court: "On the 13th day of January, 1891, the plaintiff entered a special appearance in the circuit court for the purpose of objecting to the jurisdiction of that court, and moved that the cause be remanded to the State court for the following reasons: (1) The action was not and never had been in the circuit court; (2) the action was never removed from the State court; (3) a judgment had been duly rendered and entered in the State court in

the cause in favor of the plaintiff and against the defendant, and within the past fifteen days, and since a filing of a transcript of the record in the circuit court, the defendant appeared in the action in the State court, and did therein, on the 3d day of January, 1891, move the State court to have the aforesaid judgment against it vacated and set aside, which motion was then pending upon its merits in the State court, and argument upon it had been continued by consent of both parties until January 17th, 1891; and (4) by making said motion and said appearance in the State court, the defendant submitted itself to the jurisdiction of the State court in the action and thereby waived any and all right which it possessed to a removal of the cause to the circuit court. Argument was had on this motion, and on the 31st of March, 1891, the circuit court entered an order sustaining the motion and remanding the cause to the State court.—45 Fed. Rep. 433."

That remand was ordered pursuant to the act of congress of 1888 (chap. 866, vol. 25 U. S. Stat. at Large), and immediately carried into effect.

1. We insist that that decision of the United States circuit court for the District of Minnesota, remanding this case to the State court was, and is, *final* and conclusive, and that this court has not the appellate jurisdiction to review that decision now any more than it had on the former writ of error from that remanding decision of the circuit court.

The last paragraph of section 2 of chapter 866, Vol. 25, U. S. Statutes at Large, being the act correcting the act of 1887 to determine the *jurisdiction* of the circuit courts of the United States and to *regu-*

late the removal of causes from State courts, is as follows:

> "Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, *such remand shall be immediately carried into execution*, and *no appeal or writ of error* from the decision of the circuit court so remanding such cause *shall be allowed*."

The manifest intention of congress in so enacting was to make the decision of the circuit court in remanding a case to the State court, *final* and conclusive. In providing that "*such remand shall be immediately carried into execution*," it, in effect, so declared and closed the door upon all controversy as to such being their intention.

2. We understand this court to have October 24, 1887, so expressly decided in *Morey vs. Lockhart, 123 U. S. 56*. In that case this court said:

> "Before the act of March 3, 1875, there could be no appeal from an order of the circuit court remanding a suit which had been removed, because such an order was not a final judgment or decree in the sense which authorizes an appeal or writ of error. Railroad company vs. Wiswall, 23 Wall. 507. That act, however, provided in express terms that 'the order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme court on writ of error or appeal, as the case may be.' 18 Stat. 470 chap. 137, last paragraph of sec. 5, and under this authority numerous cases have beed brought to this court by appeal or writ of error for the review of such orders. But, by sec. 6 of the act of 1887, chap. 373, the last paragraph of sec. 5 of that of 1875, chap 137, was expressly repealed and in the last paragraph of sec. 2 of the act of 1887, it was enacted that 'Whenever any cause shall be removed from any State

court into any Circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such case shall be allowed.' It is difficult to see *what more could be done* to make the action of the circuit court FINAL *for all the purposes of the removal*, and *not the subject of review in this court*. First, it is declared that there shall be no appeal or writ of error in such a case and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed.

"It is contended, however, that the prohibition against appeals and writs of error in the act of 1887 applies only to removals on account of prejudice or local influence; but that cannot be so. The section of the statute in which the provision occurs has relation to removals generally, those for prejudice or local influence as well as those for other causes, and the prohibition has no words of limitation. *It is in effect that no appeal or writ of error shall be allowed from an order to remand, in 'any cause' removed 'from any State court* into any circuit court of the United States.' The fact that it is found at the end of the section and immediately after the provision for removals on account of prejudice or local influence has, to our minds, no special significance. *Its language is broad enough to cover all cases*, and such was evidently the purpose of congress.

* * * * * * *

"It follows that we have no jurisdiction of this appeal, and the motion to dismiss is consequently granted."

3. While it is true that the writ of error in that case (Morey vs. Lockhart) as well as the former writ of error to the circuit court in this case, were dismissed (as had often been done under the act of 1875) upon the ground that the order of the circuit court remanding the cause to the State court was

not a final judgment; we respectfully submit that the act of 1888 (correcting enrolment of that of 1887) declared such order to be *final*, and requires this court to so hold.

Nothing appears in the reports of those cases to indicate that more was claimed upon the motions to dismiss them, and we presume that this court, following established usage, confined its reasons to those presented and discussed by counsel.

4. We are warranted in here insisting upon it that this act makes the remanding order of the circuit court final by the fact that in none of the several decisions of this court, affirming *Morey vs. Lockhart*, that we have found has it stated, or indicated, an opinion contrary to what we have claimed. On the contrary, the statements of what was decided, as to this, in that case fully sustains the claim that that remanding order is final and conclusive; and that this court has so held in *Morey vs. Lockhart*.

In *Wilkinson vs. Nebraska, ex rel. etc., 123, U. S. 286* (decided November 14, 1887), upon a motion to dismiss a writ of error to the circuit court, bringing up for review such a remanding order, this court, in granting the motion, said:

> "We have already decided at the present term, in Morey vs. Lockhart, ante, page 56, that *since the act of March 3, 1887, 24 Stat. 552, c. 373, no appeal or writ of error lies to this court under the last paragraph of sec. 5 of the act of March 3, 1875, from an order of the circuit court remanding a suit which had been removed from a state court*. That, however, was a case in which the suit was begun and the removal had after the act of 1887 went into effect. Here the suit was begun and a petition for removal filed in the State court before the act, and this, it is contended, saves to these parties their right to a writ of

the act of February 25, 1889," referred to the acts of 1875, 1887 and 1888, relating to removals, and several of the decisions thereon, and said:

> "The act of 1875 made such order reviewable, (without regard to the pecuniary value of the matter in dispute); but by the act of March 3, 1887 (24 St. 552, 555), as corrected by the act of August 13, 1888 (25 St. 433), the provision to that effect was repealed, and it was also provided that *no appeal or writ of error should be allowed* from the decision of the circuit court *remanding a cause*. In Morey vs. Lockhart, 123 U. S. 56, 57; 8 Sup. Ct. Rep. 65, Mr. Chief Justice Waite, speaking for the court, said: 'It is difficult to see *what more could be done* to make the action of the circuit court *final, for all the purposes of the removal*, and *not the subject of review in this court*. First, it is declared that there shall be no appeal or writ of error in such case, and then *to make the matter doubly sure*, the only statute which ever gave the right of such an appeal or writ of error *is repealed*.'"

Later still, in *Joy vs. Adelbert College, 146 U. S. 355* (decided December 5, 1892,) this court dismissed an appeal from an order of the circuit court remanding the case to the State court. In that case the judge of the circuit court certified to this court that

> "The court is of the opinion that the citizenship of the various parties hereto, as shown by the record and affidavit filed herein, is such that this court has no jurisdiction of the cause, and, on this ground alone, the court granted the motion and orders said cause to be remanded to the court of common pleas of Lucas county."

This court granted the motion to dismiss, only saying in the opinion that it was "granted upon the authority of," naming several of the cases to the same effect which are elsewhere cited herein; but the syllabus of that case is to the point, and as follows:

> "This court has *no jurisdiction* of an appeal

from a judgment of a circuit court *remanding* to a State court, a case which had been improperly removed from it."

5. In all of this class of cases (including the one at bar, when formerly before this court) this court has followed the former rule laid down in *Railroad Co. vs. Wiswall, 23 Wall. 507;* manifestly because that was a sufficient reason for dismissing those writs.

Here the case is presented differently. We insist that it was the clearly expressed intention and purpose of congress, by the act of 1887 and the corrected act of 1888, that the remanding orders of the circuit courts should be *final* and conclusive upon the question of jurisdiction; and we confidently rely upon the decision of this court in *Morey vs. Lockhart, 123 U. S. 56,* as fully sustaining us in this construction of those acts.

For this court to hold otherwise would be to, in effect, repeal and nullify that mandatory provision in the above quoted portion of section 2 which declares that "SUCH REMAND SHALL BE IMMEDIATELY CARRIED INTO EXECUTION."

The power of congress to thus limit the tribunal that shall determine whether an action is removable to the Federal court will not be seriously questioned.

6. It has already been decided by this court, in the case at bar, that the act of 1891 only authorizes appeals on writs of error from *final* judgments of the *circuit* court; citing *McLish vs. Roff, 141 U. S. 661.*

The act of 1889 (25 stat. 693, chap. 236) has no application to this case. It applies (sec. 1) only to "all cases where a *final judgment* or decree shall be rendered in a circuit court of the United States," etc.

error under the act of 1875, 18 Stat. 470, because of a proviso in sec. 6 of that of 1887, in these words: 'Provided, that this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State or suit commenced in any court of the United States, before the passage hereof except as otherwise expressly provided in this act.'

'This, in our opinion, relates only to the jurisdiction of the circuit court and the disposition of the suit on its merits; and has no reference to the jurisdiction of this court under the act of 1875 for the review of appeal or writ of error of an order of the circuit court remanding the cause. That was 'expressly provided' for in the last paragraph of Sec. 2, of the act of 1887, in which it was enacted that 'whenever any cause shall be removed from from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, *such remand shall be immediately carried into execution*, and no appeal or writ of error from the decision of the circuit court so remanding such cause *shall be allowed*.' This provision, when taken in connection with the repeal by Sec. 6 of the last paragraph of Sec. 5, of the act of 1875, *shows unmistakably an intention on the part of Congress* to *take away all appeals and writs of error to this court* from orders thereafter made by circuit courts, *remanding suits* which had been removed from a State court, and this whether the suit was begun and the removal had before or after the act of 1887. The motion to dismiss is granted."

Again, in *Sherman vs, Grinnell, 123 U. S, 679* (decided November 21, 1887), upon a similar motion, this court said:

"The first question which presents itself is, whether we have jurisdiction of the writ. We have already decided, at the present term, in Morey vs. Lockhart, ante, 56, that *this court cannot review, on appeal or writ of error, the order of a circuit court, remanding a suit which*

had been removed under the act of 1887 and which was begun, removed, and remanded after that act went into effect. Later in the term we decided, Wilkinson vs. Nebraska, ante, 286, that we had no jurisdiction when the suit was begun and removed before the act of 1887, but not remanded until afterwards. In the last case we said that this statute showed 'unmistakably an intention on the part of Congress to *take away all appeals and writs of error* to this court from orders thereafter made by circuit courts remanding suits which had been removed from a State court, and this whether the suit was begun and the removal had before or after the act of 1887.' That was *as far as it was necessary to go in any suit that had come before us down to that time.* Here, however, the question reaches one step further, and requires us to determine whether we can take jurisdiction on appeal or writ of error if the order to remand was made whilst the act of March 3, 1875, c. 137, 18 Stat. 470, was in force, but the writ of error was not brought until after that of March 3, 1887, went into effect, and we are of opinion that we cannot. This is the logical result of what has already been decided. Until the act of 1875 there was no such jurisdiction. Railroad Co. vs. Wiswall, 23 Wall. 507. The provision of that act giving the jurisdiction was repealed by the act of 1887 without any reservation as to pending cases, the proviso in the repealing section having reference 'only to the jurisdiction of the circuit court, and the disposition of the suit on its merits.' Wilkinson vs. Nebraska, *ubi supra.* As a consequence of this the repeal operated to *take away jurisdiction in cases where the order to remand had been made,* but no appeal or writ of error taken; because 'if a law conferring jurisdiction is repealed, without a reservation as to pending cases, all such cases fall with the law.' Railroad Co. vs. Grant, 98 U. S. 398, 401, and cases there cited.

"It follows that we have no jurisdiction of this writ of error, and it is accordingly dismissed."

Again, in *Richmond & D. R. Co. vs. Thouran, et al. 134 U. S. 517* (decided March 10, 1890), this court, in dismissing a writ of error, "granted under

The (correcting) act of 1888 (25 stat. 433) is the only one that is applicable to this case.

7. Our claim is, that the object and purpose of Congress, in providing that there should be no appeal, or writ of error, from an order of the circuit court *remanding a cause* to the State court, was to shorten the period in which the matters in suit could be in litigation, and to, as far as possible, preclude the possibility of protracted litigation upon the question of removal. It had been found that the right to an appeal or writ of error, was a means which parties desiring delay could always employ to prolong the litigation for years, where a cause was remanded to the State court.

Congress concluded that the question of removal could safely be left to the circuit courts; especially as this court had ruled upon every possible phase of the questions of citizenship, federal question, etc.

The order remanding this cause was, and is, therefore final, and not reviewable in this court.

SECOND.

THIS ACTION WAS NEVER "REMOVED" TO THE FEDERAL COURT.

BECAUSE NO APPLICATION TO SO REMOVE IT WAS EVER MADE TO THE STATE COURT.

1. So much of the act of congress (25 Stat. Chap. 866; act of 1888) as prescribes the manner in which a cause can be removed from a state court to the Federal Court, is as follows:

> SEC. 3. That whenever any party entitled to remove any suit mentioned in the next preceding

section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court to the Circuit Court of the United States, he may make and file a *petition* in such suit *in such state court* at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, *for the removal of such suit into the Circuit Court* to be held in the district where such suit is pending, and shall make and file therewith a bond, with *good and sufficient* surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the *record* in such suit, and for paying all costs that that may be awarded by the said Circuit Court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be *the duty of the state court* to *accept* said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court.

2. We do not understand how it can be seriously claimed that that law does not contemplate, and require, that the petition and bond for removal, therein provided for, is not to be *presented and submitted to the state court* for its consideration and action.

Section 2 specifies the class of cases that *may* be removed to the Federal Circuit Court; but is silent as to the procedure to "remove" such an action. The above portion of section 3 is all there is which prescribes how such a removal is to be effected.

Section 3 provides that a *petition* and *bond* shall be filed "in such state *court*." This was intended to mean that their proper reception in the state court

was to be more than the mere ministerial act of filing by the clerk.

Who is to say whether the so-called "petition" presented by the defendant, is, in fact, a petition, or that it *shows* that defendant is entitled to have the case removed? Will it be said that congress intended that the *defendant* should be the judge, in the first instance, of the sufficiency of the petition and bond; and that the plaintiff could do nothing but wait (perhaps six months, or it may be a year,) to make a motion to remand; although the petition may not have had a single fact stated therein, which is necessary to show that defendant had a right to a removal, and that the bond is mere "straw bail."

A "bond with good and sufficient surety" is to be filed with *the court*. Who is to pass upon the sufficiency of that bond and the sureties therein? Will it be claimed that a *defendant* has the right to prepare *anything* which *he* terms a petition or "bond," signed by any person whom *he* deemed "good and sufficient surety;" and by merely filing them with the *clerk* oust the State Court of jurisdiction, *without the judge thereof knowing it had been done?*

To ask these questions is to answer them. Yet they are necessary to emphasize the *reductio ad absurdam*, of the position of plaintiff in error.

3. It is manifest, to any unbiased mind, that when congress made it "the duty of the *State Court* to *accept* said petition and bond," it contemplated a petition which contained facts sufficient to show that defendant was *prima facie* entitled to have the case removed, and that as to this, and that the bond was in proper form, and had "good and sufficient surety,"

the judge of the State Court should, *in the first instance, decide.*

To claim contrary to this, is to claim that congress, in saying that it is the duty of the State Court to accept said petition and bond, intended that the state court should accept *anything* that the defendant termed a "petition" and "bond." To so claim is an uncalled for reflection upon the intelligence of congress.

In this case, the State Court was not given even the opportunity to "accept" what was filed, *with the clerk*, as a "petition" and "bond," and it is here seriously claimed that the State Court was *ousted* of jurisdiction, *without the judge thereof being allowed to know* that this was even attempted.

4. What was in fact done, to effect what is now claimed to be a "removal" of this action to the Federal Court, we will leave to the attorney for plaintiff in error and the clerk of the court, in their affidavits herein to tell. In his affidavit in support of the motion made in the State Court to vacate and set aside the judgment (p. 35) the then attorney for plaintiff in error (Mr. S. L. Perrin) upon the point, says:

> "That on or about the first day of November, A. D., 1890, and prior to the expiration of the time within which the defendant was required by the laws of the State of Minnesota and the rules of said district court of said Scott county, the court in which said action was pending, to answer or plead to the plaintiff's said complaint herein, *affiant, as such attorney, caused to be made and filed in the office of the clerk of said district court* a duly verified petition by said defendant, *praying the removal* of said cause to the Circuit Court of the United States for the district of Minnesota, and did cause to be made *and*

filed with said petition a proper bond, with good and sufficient surety, for its entering in said Circuit Court on the first day of the next session, a copy of the record in such suit, and for paying all costs that might be awarded by said Circuit Court if said court shall hold that said suit was wrongfully or improperly removed thereto; *and the clerk of said district court of Scott County* did make a certified copy of the *record* in said cause in said court, and that the same was duly filed in the office of the clerk of said Circuit Court of the United States for the District of Minnesota, at St. Paul, in said district, on the third day of November, A. D. 1890."

In his affidavit (pp. 38, 39) the clerk of the court states more fully and clearly what was done on that occasion. He says:

"That on the first day of November, A. D. 1890, there was presented *to him* as said deputy clerk, and for and in behalf of said defendant, what was represented and purported to be *a copy of the summons and complaint herein*, and a petition for the removal of said action to the Circuit Court of the United States for the District of Minnesota, and a bond for the same; copies of which said copy, summons and complaint, and of said petition and bond, are hereto attached, and marked respectively "A," "B," "C" and "D," and made a part of this affidavit; and *this deponent was then and there requested by said defendant* to then and there *file said copy, summons and complaint* and said petition and bond *in said office*, and in said action, and that he then and there did so file them."

That *upon so filing* said *copy, summons and complaint* and said petition and bond, he was *thereupon* requested *by said defendant* to *make a copy of each and all of them* and to *certify to the as being a copy of the record in said action.*

That said copy summons and complaint and said petition and bond were *the first papers filed in said action*, and the *only papers then on file therein*, and they constituted *the entire record therein* and that this deponent *thereupon* and on said first day of November, A. D. 1890, *as said*

deputy clerk of said court, made a copy of said *copy*, summons and complaint and of said petition and bond, and of the endorsements of filing thereon, and certified to the same as being a true copy of the same, and of the record of said action in said clerk's office, and *then and there* delivered the same to the person *acting for and representing said defendant* in the matter.

That the *copy of said copy, summons and complaint* and of said petition and bond, so hereto attached, and marked respectively "A," "B," "C" and "D," constitute and are *a full and complete copy* of what this deponent *then made and certified to* as the *record of* and in said action, and *delivered to the said defendant* as hereinbefore stated.

That said copy summons and complaint and said petition and bond, so filed as hereinbefore stated, or either of them, *had not been* at the *time of said filing the same, or at any time before copies thereof were so made* by this deponent, *submitted to said court*, or the judgment thereof, and *that no order directing that said action be removed* to the Circuit Court of the United States *was made or filed therein before or when this deponent made said certified copies* of said copy, summons and complaint and said petition and bond, and that *no such order of said district court, in and for said county of Scott*, or any other court *has since been filed herein* in said clerk's office.

That this deponent *made all of said copies*, and so certified to the same, *solely upon and at the request of the defendant*, and *without any order or direction from said district court* in and for said county of Scott, *or any other court*, requesting or directing him so to do.

That on said first day of November, A. D. 1890, the said district court in and for *said county of Scott* was not open [in session] and that Hon. J. C. Edson is the judge thereof, and resides in the village of *Glencoe, in the county of McLeod*, in said State of Minnesota, and that this deponent *was then informed, and believes*, that he, *said judge, was then at his home in said village of Glencoe.*"

We respectfully submit, and insist, that what was then and there done was, *in no sense*, a compliance

with the act of congress; and that it did not operate to *even suspend* the jurisdiction of the State Court; as would have been the case if he had submitted the papers to the court—the judge of that district—*before* making and filing a transcript of the record in the Circuit Court.

What was then done, by the plaintiff in error, was simply (whether so intended or not) an insult to the state court, which this court will not countenance.

5. In his affidavit, above quoted, the attorney for the plaintiff in error says he filed a "verified petition *praying the removal*," etc. "Praying" to whom?

Anderson's Dictionary of Law, defines a *petition* to be "an *application* in writing, to *bring before a court* a matter in regard to which *judicial action* is "necessary."

6. In view of the several previous decisions of this court, clearly stating and indicating what was necessary to be done, to comply with the act of congress, and the fact that by agreement it was a *domestic* corporation, the action of plaintiff in error, is explainable upon no other theory that it was done *for delay*. Its then attorneys and counsel were, like the present counsel, experienced and eminent in the profession: and must have been familiar with those decisions.

THIS QUESTION SETTLED IN THIS COURT.

7. This question—as to whether a cause can be removed from the state to the Federal Courts, without submitting the removal papers to the state court, and by merely filing them with the clerk of the state court—has been so fully passed upon and decided, by this

court, that it must be considered as *settled;* and as we contend. It is a matter of surprise to us that it is now necessary for us to argue a question that must be considered as within the doctrine of *stare decisis.*

In the so-called "Removal Cases," *Meyer vs. Construction Co.; Construction Co. vs. Meyer* and *Railroad vs. Meyer, 100 U. S. 3,457,* this court so clearly recognized the right of the state court, to pass upon the sufficiency of the petition and bond for removal, that it is surprising that there should thereafter be any difference upon it. It said:

> "The petition was not signed. No objection was made on this account *in the state court,* and it *came too late in the Circuit Court.* If it had been made in *the state court,* the defect, if there was one, would no doubt *have been cured at once* by the signature of the counsel.'
> * * * * * * * * * * *
>
> 'The bond was insufficient in form. The condition was such as the statute required. * * * No objection made to the sufficiency of the surety. The only complaint seems to have been that one of the persons who signed the bond as a surety was an attorney of the court, which was forbidden by the laws of Iowa and the practice of the state court. * * * The question here *is not whether* the court below (*the state court*) had *the right to pass upon* the sufficiency of the surety; but *whether,* upon the facts as they appear in this record, *it was justified in refusing to accept* this bond. We are now examining the case, after judgment below, in reference to errors which are alleged to have occured in the progress of the cause. *If the state court refuses* to accept a bond offered by a petitioner for removal which has good and sufficient surety in law, it is an error that may be *reviewed* here."
> * * * * * * * * * * *
>
> "We *fully recognize* the principle, *heretofore asserted in many cases,* that *the state court is not required to let go its jurisdiction* until a case is made, which upon its face, shows that the peti-

tioner can remove the cause as a matter of right."

In the above case it was contended, (1) that the petition was insufficient because not signed; (2) that the bond was insufficient; (3) that the application was not made in time—"before trial",—and (4) that the applicant was not a citizen of another state."

That decision was under the act of 1875, (Sec. 3, Chap. 137), but it will be found that the language of the law, under which appellant attempted to remove this case (Sec. 3, Chap. 866, Vol. 25, U. S. Stat. at Large) is precisely the same as it was when that decision was rendered; except that, as above shown, the decision of the Circuit Court *is final.*

This court has always, when called upon to pass upon this question, recognized and maintained the right of the state courts, to pass upon the petition and bond, *in the first instance.*

Shortly after the rendering of the last decision, this court, in *Railroad Co. vs. Koontz, 104 U. S. 14,* said:

> "It is a *well settled* rule of decision in this court that when a *sufficient case for removal is made in the state court,* the rightful jurisdiction of that court comes to an end, and no further proceedings can properly be had there, unless in some form its jurisdiction is restored, Gordon vs. Longest, 16 Pet. 97; Kanouse vs. Martin, 15 How, 198; Insurance Co. vs. Dunn, 19 Wall, 214; Railroad Co. vs. Mississippi, 102 U. S. 135. The entering of the copy of the record in the Circuit Court is necessary to enable that court, to proceed, but its jurisdiction attaches *when* under the law it *becomes the duty of the state court* to proceed no further. The provision of the act of 1875 is, in this respect, substantially the same as that of the twelfth section of the judiciary act of 1789, and requires the state court, when the petition and a *sufficient* bond are *presented,* to pro-

ceed no further with the suit; and the Circuit Court, when the record is entered there, to deal with the cause as if it had been originally commenced in that court. The jurisdiction is changed when the removal is *demanded in proper form, and a case for removal made.* Proceedings in the Circuit Court may begin when the copy is entered."

Still later, it became necessary for this court to inform litigants as to the rights of the state and Federal courts, in the matter of the removal of causes; and in the case of *Stone vs. South Carolina, 117 U. S. 430*, in delivering the opinion of the court, Chief Justice Waite said:

"A state court is *not bound to surrender its jurisdiction* of a suit, on a petition for a removal *until a case has been made* which on its face, *shows* that the petitioner *has a right to the transfer.* It is undoubtedly true that, upon the filing the petition and bond—the suit being removable under the statute—the jurisdiction of state court absolutely ceases, and that of the Circuit Court immediately attaches; *but still,* as the right of the removal is statutory, *before* a party can avail himself of it, he *must show* (*to the state court*) upon the record, that his is a case which comes within the provision of the statute. The *mere filing of a petition for the removal of a suit* which is not removable, does not work a transfer. All issues of fact made upon the petition for removal must be tried in the Circuit Court, *but the state court is at liberty to decide* FOR ITSELF *whether,* on the face of the record, *a removal has been effected.* It *decides against* the removal and proceeds with the cause, notwithstanding the petition, its ruling on that question will be *reviewable here* after final judgment, under section 709."

In the later case of *Burlington, C. R. & N. Ry, Co. vs. Dunn, 122 U. S. 513*; this Court again reviewed this question. Recognizing the conflicting opinions of several of the courts upon the subject, it said

"It must be confessed that *previous to the cases of Stone vs. South Carolina, 117 U. S. 432,* and *Carson vs. Hyatt, 118 U. S. 279,* (decided at the last term) the utterances of the Court on that question had not always been as clear and distinct as they might have been.' * * * * * *

* * 'In other cases expressions of a similar character are found which seem to imply that the State Courts are at liberty to consider the actual facts *as well as the law* arising on the face of the record, after the *presentation* of the petition for removal. At the last term it was found that the question had become a practical one, about which there was a difference of opinion in the State Courts, and to some extent in the Circuit Courts; and so, in deciding Stone vs. South Carolina, we took occasion to say: 'All issues of fact made upon the petition for removal must be tried in the Circuit Court, but *the State Court is at liberty to determine for itself* whether, on the face of the record, a removal has been affected.' This rule was again recognized at this term in Carson vs. Dunham, ante 1030, and is *in entire harmony with all that has been previously decided,* though not with all that *has been said* in the opinions in some of the cases. To our minds it is the true rule, and calculated to produce less inconvenience than any other.'

The theory on which it rests is that the *record* closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents then *to the State Court a pure questoin of law*; and that is whether, admitting the facts stated in the petition to be true, it appears upon the face of the *record,* which *includes the petition and the pleadings and proceedings down to that time,* that the petitioner is entitled to a removal of the suit. That question *the State Court has a right to decide for itself,* and if it errs in keeping the case, and the highest court of the state affirms its decision, this Court has jurisdiction to correct the error, considering, for that purpose, only the part of the record which ends with the petition for removal. Stone vs. South Carolina, 117 U. S. 432, and cases there cited."

8. Since these last decisions of this court were made known, the practice, upon this, has become settled, and followed by the Circuit Courts generally.

In *Shedd vs. Fuller, 36 Fed. 609*, Judge Gresham closed his opinion as follows:

> "The right of removal is purely statutory, and *the jurisdiction of the State Court remains undisturbed until a proper petition and bond are presented to that court for its judicial action.* It is *not sufficient to present the petition and bond to the clerk*, who is the courts mere ministerial officer. While it is clear that the right of removal does not depend upon the action or non-action of the State Court, it is *equally clear* that the State Court cannot be deprived of its right to decide for itself upon the sufficiency of the petition and bond. The *presentation of a proper petition and bond to the State Court* for its action is a *jurisdictional prerequisite.* Stone vs. South Carolina, 117 U. S. 430, 6 Sup. Ct. Rep. 799. Motion to remand sustained."

In the opinion in the case of *Zambrino vs. Galveston, H. & S. A. Ry. Co., 38 Fed. R. 449 (452)* the court enters into a very full discussion of the jurisdiction of the Circuit Court, in the case of diverse citizenship; under the changes and limitations of the act of 1887, re-enacted in 1888. In that case it became necessary to construe that portion of that act which provides that—

"Where the jurisdiction is founded only on the fact that the action is between citizens of *different* states, suits shall be brought *only* in the district of the residence of either the plaintiff or the defendant."

In discussing, generally, the status of non-resident corporations, as defined by this court, that court said:

> "Since the case of Insurance Company vs. French, 18 How. 404 et seq., it has been uniformly held by the Supreme Court that a corporation

'cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it *shall consent to be sued there*. If it do business there, it will be presumed to have assented, and will be found accordingly.' Railroad Co. vs. Harris, 12 Wall. 81. And it is further held that 'a corporation of one state, doing business in another, is suable in the courts of the United States established in the latter state, if the laws of that state so provide, and in the manner provided by those laws.' Insurance Co. vs. Woodworth, 111 U. S. 146, 4 Sup. Ct. Rep. 364. The doctrine is clearly stated in an able opinion rendered by Judge Jackson in the Telephone Case, before cited, where the leading authorites are collected, 29 Fed. Rep. 35."

See also *Riddle vs. N. Y. L. E. & W. R. Co., 39 Fed. R. 290 (291)*, to the same effect.

We quote these also to show that the Circuit Courts generally, construe the decisions of this court as we do here.

In *Hall vs. Chatanooga Agricultural Works, 48 Fed. 599*, the Circuit Court of E. D. Tennessee (Judge Keyes delivering the opinion) shows that it understands the above decisions of this court as we do, and declares itself in the following clear and explicit manner:

"It would be premature, and a want of comity, for this court now to say that the cause had been removed *before the State Court had an opportunity to consider and pass upon the question the law submits to it*. Moreover, *the cause is not removed until* the petition and bond shall be *presented to the State Court for acceptance*. Then, *and not until then*, is the State Court required to determine whether it will proceed further or not. If the petition and bond conform to law, the cause is removed; if not, it is not removed. The decisions relied upon by petitioners' attorney were made in *cases in which* petitions

> and bonds *had been presented to the State Court* complying with the requirements of the law, but in each case the State Court declined to accept the petition and bond, and proceeded further, or attempted to do so, in the suit. When the State Court considers the application for removal so far as to accept or reject petition and bond, *if the application be such as authorizes a removal*, the removal relates back to the date of the application; but it would be *something remarkable for a party to go to the clerk in vacation, file his application for removal, and take his suit into this court, without presenting the matter to the State Court at all*, or giving it an opportunity to accept the petition and bond as the law prescribes."

Many other cases could be quoted from, but the foregoing are deemed sufficient, to fully cover the ground and sustain us.

CONSTRUCTION OF THE STATE COURTS.

The Supreme Court of Georgia, in *Carswell vs. Schley, 59 Ga. 17* stated in the following clear—and we submit correct—language its construction of the removal law. It is the view that has been generally entertained by the state courts, although seldom so well expressed. It said:

> "In Amory vs. Amory, 95 U. S. 186, the supreme court of the United States distinctly recognizes the right of the State court to look into the petition for removal, and compare it with the statute. *Such a right must exist of necessity.* When the court in which a case is pending is called on to yield its jurisdiction on statutory conditions, said to appear on the face of certain documents presented to it, it must inspect the documents and *determine whether the conditions appear or not.* How else is it to know whether to retain the case or part with it? Whether to grant the application or refuse it? Whether to treat the case as still pending or out of court? The scheme of removal, ordained by the act of Congress, is open and public. It is *by petition.* It contemplates a taking *with leave*, and *not*

furtively by a sort of statutory larceny. The State Court is to know of the proceedings for removal, and to see that they are such as the act prescribes. When they conform to the act the court has no right or power to retain the case; and when they fail to conform in any essential particular, it has no right or power to send the case away or order it removed. Until there is a sufficent petition there can be no transfer; and whether or not the petition, *reading it in connection with the record*, is sufficient, can and ought to be decided, in the first instance, by the court whose duty it is to accept it. The acceptance or rejection of the petition *involves a decision* upon its sufficiency. The laws of the United States are the laws of every State, and are to be administered by State courts no less faithfully than their own local enactments. All acts of Congress that speak constitutionally should be obeyed without hesitation or reluctance; they are part of our supreme law. As ultimate questions, what they mean and how they are to be administered, are for decision by the Federal judiciary; but this does not relieve the State tribunals from taking their due part in construction and administration. *Conflicting constructions need not be anticipated.* On the contrary, the presumption is that statutes which are common to the two governments will be understood by the tribunals of both to utter the same voice."

THERE WAS AMPLE OPPORTUNITY TO PRESENT PAPERS TO THE STATE COURT.

This provision of the removal law imposes no hardship upon parties having a right to remove a cause from the State to the Federal courts.

As already stated, the district courts of the State of Minnesota are *always open* for the hearing of such applications, and the granting of such orders as are under consideration.

The law of the State of Minnesota (sec. 244, chap. 66, Gen. Stat. 1878) relating to this is as follows:

"SEC. 244. *Court always open—Special terms —decisions filed out of term.* In addition to the general terms, the district court is *always open* for the transaction of *all* business, for the entry of judgments, of decrees, of orders of course, and all such other orders as have been granted by the court or judges, and for the hearing and determination of all matters brought before the court or judge, except the trial of issues of fact."

The opportunity to present the petition and bond to the State Court was therefor ample.

The summons and complaint was served on plaintiff in error (page 1) October 15, 1890, and it had twenty days to answer, and to present the petition and bond for removal to the State Court. Having filed that petition and bond with the clerk on November 1st, 1890, it still had three days left to present them to the judge of the State Court.

It could have applied for an order removing the case as easily as the defendant in error applied for the order referring the action to the referee to hear, try and determine the same.

Had plaintiff in error presented the petition and bond to the judge of the State Court, the court would have been apprised of the matter before we applied to him for a reference. The first notice the State Court had of this action was our application for an order of reference—which was granted.

It follows, from what we have above quoted and stated, that this cause was not in fact removed from the State to the Federal court; that the Circuit Court never acquired jurisdiction of it, and that it was properly ordered remanded by the Circuit Court to the State Court.

It will be borne in mind that the appearance of

the defendant in error in the Circuit Court was a special one, and limited to objecting to the jurisdiction of that court and calling its attention to the facts hereinbefore stated affecting its jurisdiction.

THIRD.

AFTER FILING SAID PETITION AND BOND PLAINTIFF IN ERROR WAIVED ITS CLAIM TO A REMOVAL.

BY APPEARING IN THE STATE COURT, AFTER JUDGMENT WAS ENTERED, AND APPLYING TO THAT COURT TO VACATE THE SAME, IT SUBMITTED ITSELF FULLY TO THE JURISDICTION OF THE STATE COURT.

Another reason why the plaintiff in error should not prevail here is, that *after* it had filed the petition and bond in the State Court, and the copy of the so-called record in the (Federal) Circuit Court, it *voluntarily returned* to the State Court, and *fully submitted itself to the jurisdiction* of the *State Court*, and therefore *waived* any and all right to a removal of this cause, or to claim that it had been removed.

It is well settled that (1) "a party entitled to removal may estop himself to apply for it, (2) that having applied he may waive the right to a removal by his *subsequent* conduct *in the State Court*.

Dillon on Removal, sec. 154.

Hanover Nat. Bk. vs. Smith, 13 Blatchf. 224.

Home Ins. Co. vs. Curtis, 32 Mich. 402.

2. It must be conceded, therefore, that if a party who has attempted to, or has in fact, removed a cause to the Federal Court, voluntarilly *returns* to the State court, and does any act which would be a

submission to the jurisdiction of the State Court, if no attempt had been made to remove it, he thereby *waives* and *abandons* the attempted removal, and submits himself to the jurisdiction of the State court, as completely as if no attempt to remove the action had been made.

3. That is the case here. The plaintiff in error filed that petition and bond with the clerk of the State Court, on the *first* day of *November*, 1890, and filed the copy of the so-called "record" in the Federal circuit on the *third* day of the same month. If, by this action, a "removal" was effected, the case was, *after* that, *in the Federal Court*, and the State could only on a resubmission to its jurisdiction, act therein.

Nearly two months *after* that, (on *December* 30th, 1890) it (pages 35, 36, 37) *returned to the State Court*, and *voluntarily* submitted itself to the jurisdiction of that court, by applying *thereto*, for an order vacating and setting aside that judgment entered therein, and staying proceedings on the part of the defendant in error pending the determination of that motion.

Plaintiff in error is here contending that, by reason of its said "removal" proceedings, which ended with the filing of the so-called "record" in the Circuit Court on the 3rd day of *November*, 1890, this cause had been "removed" to Federal Court. If this is so, it conclusively follows that it could not thereafter make that motion, in the State Court, without *submitting itself* to the jurisdiction of the State Court, and *waiving* and abandoning the removal proceedings, and its right to a removal.

4. It either so *waived and abandoned* the said removal proceedings and its right to a removal

thereunder, and returned to the State court, or it was (as in *Maning vs. Amy, 140 U. S. 147*) attempting to make a *conditional* "removal" and "experiment on its case in the State Court," and, if not successful there, "take the suit to another tribunal."

It matters not what was the purpose of that motion. It was a clear and full *submission* to the jurisdiction of the State Court.

The fact that the *ground* of the motion was that the cause had been "removed" does not aid matters any more than if the ground had been that the default had occurred and the judgment had been recovered through an excusable oversight. It was a motion and "application" for relief from the *State Court*.

5. The statutes of Minnesota (sections 84, 85, 86, chap. 66, Gen. Stat. 1878) defines orders and motions as follows:

> SEC. 84. *Order defined.* Every direction of a court or judge, made and entered in writing, and not included in a judgment, is denominated an order.
>
> SEC. 85. *Motion defined.* An application for an order is a motion.
>
> SEC. 86. *Notice of Motion—order to show cause.* When a notice of motion is necessary, it must be served eight days before the time appointed for the hearing; but the judge may, by an *order to show cause*, prescribe a shorter time.

It will be noticed that plaintiff in error made that "application" and "motion" to the *State* Court, and brought defendant in error into that court by "order to show cause" why the same should not be granted, as provided by that State statute.

6. It cannot be answered or claimed that this appearance in and submission to the jurisdiction of the State Court was in any way *necessary*.

All that was necessary was to appeal from the judgment as it did *after* so "experimenting" with the State Court and failing.

7. Finally, upon this point, that appearance in and submission to, the State Court was *general*, and in no sense, special or limited.

It follows, that for this additional reason, the plaintiff in error should not prevail here.

FOURTH.

THIS ACTION IS NOT A REMOVABLE ONE.

BECAUSE BY EXPRESS AGREEMENT, BETWEEN IT AND THE STATE, THE PLAINTIFF IN ERROR, FOR THE PURPOSES OF THIS, AND ALL SUCH ACTIONS, IS A "DOMESTIC" CORPORATION, OF THE STATE OF MINNESOTA.

By this point, the question (1) whether the legislature of a state *can*, in *granting permission* to a foreign corporation to come into the same and acquire and operate railroads and do business therein as a *domestic* corporation, impose, *as condition* of that grant, that "in all suits and *proceedings*, upon "causes of action *arising in that state*, in which the "said corporation shall be a party, it shall be deemed "to be a *domestic* corporation, and not otherwise;" and (2) whether if such foreign corporation is granted that right, *upon that condition*, and it in due form, *accepts* that permission so granted *subject to* the said *condition*—that it was in such cases to be deemed to be a *domestic* corporation—is not that condition of that legislative agreement *binding* upon such foreign corporation; or (3) can it, after receiving and enjoying all the benefits of that legislation *repudiate*

that condition, *upon which the state granted it* that permission and other rights.

1. Our contention here is (1) that the plaintiff in error, by reason of such legislative grant and conditions, and its *acceptance* of the same, must, *for the purposes of this action*, be deemed to be a *domestic* corporation, of the State of Minnesota, and not otherwise; and (2) that, for that reason, this case is *not* a "*removable one.*"

THE LEGAL STATUS OF PLAINTIFF IN ERROR IN MINNESOTA.

2. In the year 1881, the plaintiff in error, then a non-resident corporation, desired to come into the State of Minnesota to acquire railroads, and operate them, and do business as such corporation therein. To accomplish this purpose, it applied to the legislature of that State for permission to do so, and at the session of that year (1881) that legislature granted them all the *rights and powers* which a corporation created *under the laws of that State* could exercise, *including* the important one of exercising the power of eminent domain, by the passage of the following acts, or laws:

> "An act to authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company to acquire, construct, maintain and operate railroads in the State of Minnesota;" Approved February 11, 1881; the same being chapter 219, Special Laws of Minnesota for the year 1881.
>
> "An act to authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company to purchase, own and operate the St. Paul & Sioux City Railroad and its proprietary or connecting roads, and to issue stock and bonds thereon;" Approved February 11, 1881; the same being chapter 228, Special Laws of Minnesota for the year 1881.
>
> "An act to confer upon the Chicago, St. Paul,

> Minneapolis & Omaha Railway Company the rights, powers, franchises, privileges and immunities within the State of Minnesota heretofore conferred upon the Chicago, St. Paul, Minneapolis & West Wisconsin Railway Company, the successor in the State of Minnesota of the Chicago, St. Paul, Minneapolis and West Wisconsin Railway Companies;" Approved February 11, 1881; the same being chapter 362 of the Special Laws of Minnesota for the year 1881.

These laws were all offered and received in evidence (pages 17-18) before the referee, and offered and cited before the judge of the State Court, upon that motion to vacate the judgment. They are therefore properly here for the consideration of this court.

But, even if they had not been offered, it is settled, by this court, that "the law of any State of the Union, whether depending upon the statutes or judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, *without plea or proof.*"

Lamar vs. Micou, 114 U. S. 218.

Owings vs. Hull, 9 Pet. 607.

Pennington vs. Gibson, 16 How. 65.

Covington Drawbridge Co. vs. Shepherd, 20 How. 227.

3. It will be seen (by the above named acts) that the legislature of Minnesota (1) by chap. 219, authorized the plaintiff in error to "acquire, construct, maintain and operate railroads in the State of Minnesota," but upon the terms and conditions therein stated (2) that, by chap. 228, it authorized it to "purchase, own and operate the St. Paul & Sioux City Railroad," (the one upon which this cause of action arose) "and its proprietary or connecting

roads, and to issue stock or bonds thereon," and (3) by chap. 362, conferred upon it "the rights, powers, franchises, privileges and immunities, within the State of Minnesota, heretofore conferred upon the Chicago, St. Paul & Minneapolis & West Wisconsin Railway Company, the successor in the State of Minnesota, of the Chicago, St. Paul & Minneapolis, and West Wisconsin Railway Companies;" but upon the terms and conditions therein specified, and hereafter quoted and set forth.

As said chapter 219 is the one which (with its acceptance thereof) made the plaintiff in error, for the purposes of this and similar suits, a *domestic* corporation, of the State of Minnesota, we here copy it in full.

> SEC. 1. The Chicago, St. Paul, Minneapolis & Omaha Railway Company, (a corporation created and existing under the laws of the State of Wisconsin), its successors and assigns, is hereby *authorized and empowered* to locate, construct, maintain and operate in the State of Minnesota, and to lease, sell or encumber the same, any railroad or railroads which, when constructed, could be operated in connection with any railroads now or hereafter to be lawfully acquired, operated or controlled by said Chicago, St. Paul, Minneapolis & Omaha Railway Company, in said state, as an extension or branch thereof; and to that end, the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, its successors and assigns, shall have and possess, and may exercise and enjoy, in addition to the powers, privileges and franchises specially conferred upon said company, all the rights, powers, franchises, privileges and immunities, including the power of eminent domain, conferred by the laws of the State of Minnesota upon railway companies organized thereunder, and may also exercise throughout this state, in connection with any railroad now owned, controlled or operated by it, or which it may hereafter lawfully own, control or operate, the

powers conferred upon the Chicago, St. Paul, & Minneapolis Railway Company by chapter one hundred and eighty-three (183) of the Special Laws of Minnesota, of the year A. D. one thousand eight hundred and seventy-nine (1879), as to the counties therein named; and the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, its successors and assigns, may acquire by purchase, lease or otherwise, any railroad or railroads, or the stock or other securities thereof, now constructed or hereafter to be constructed in the State of Minnesota, so situated with reference to any railroad now owned, or hereafter to be acquired by said Chicago, St. Paul, Minneapolis & Omaha Railway Company, its successors and assigns, as to constitute an extention, branch or feeder thereof, and which may be operated in connection therewith. *Provided, however,* that nothing herein contained shall authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company, its successors or assigns, to acquire or control, by purchase or otherwise, any parallel and competing line of railroad within this state; and *provided, further,* that the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, its successors and assigns, shall *in exercising the power of eminent* domain by this act conferred, and in all proceedings and appeals therein, be taken and held in all courts and places to be a domestic corporation; and *provided, further,* that in *all suits* and proceedings *upon causes of action arising in this state* in which the said Chicago, St. Paul, Minneapolis & Omaha Railway Company shall be a party, it *shall be deemed to be, for all purposes, a* DOMESTIC *corporation, and not otherwise.*

SEC. 2. This act shall take effect and be in force from and after its passage.

The purpose and object of attaching this condition to this grant of authority is manifest. It is public history that before this (and even since) the public, who are not adversely interested, have protested and are protesting against non-resident corporations having the right to drag any person who sues them

from the courts of their own county to the Federal courts; *in most instances far distant from their homes*. Recognizing the justice of this claim, and seeing no good reason why this *non-resident* corporation should be favored more than one of its own corporations, the legislature imposed this condition upon this grant of authority.

Now, when this condition was attached to this grant, and made a part of it, the plaintiff in error was *not compelled to accept* it. It was *free to decline* the permission to come into the state upon these conditions, or any that were attached to it. But it did not.

And its acceptance of this legislation was not merely that of coming into this state and purchasing the railroad upon which respondent was injured, but it by resolution accepted this legislation and these grants of authority, "subject to the limitations, restrictions and conditions in each of said acts contained," in as solemn and binding a manner as it was for a corporation (or an individual) to do.

PLAINTIFF IN ERROR ACCEPTS THESE CONDITIONS

Soon after the passage of the above mentioned acts of the legislature, and on the 21st day of April, A. D. 1881, the Board of Directors of the appellant company met and *by resolution* accepted these acts, "subject to all the limitations, restrictions and conditions in *each* of said acts contained." These resolutions will be found on pages 24 and 25 of the Record and are as follows:

> At a meeting of the Board of Directors of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, duly called and held at the office of the company, No. 52 Broadway, New York, on the 21st day of April, A. D. 1881, at 12 o'clock

of said day, there being present a quorum of said board, the following preamble and resolutions were duly adopted, that is to say:

WHEREAS, The legislature of the State of Minnesota, at its session of 1881, passed divers acts, to-wit: An act entitled "An act to confer upon the Chicago, St Paul, Minneapolis & Omaha Railway Company the rights, powers, franchises, privileges and immunities within the State of Minnesota heretofore conferred upon the Chicago, St. Paul & Minneapolis and West Wisconsin Railway Companies, and to declare the Chicago, St. Paul, Minneapolis & Omaha Railway Company the successor, in the State of Minnesota, of the Chicago, St. Paul & Minneapolis and West Wisconsin Railway Companies," approved February 11, A. D. 1881; and

An act entitled "An act to authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company to purchase, own and operate the St. Paul & Sioux City Railroad and its proprietary or connecting roads, and to issue stock and bonds thereon," approved February 11, A. D. 1881; and

An act entitled "Act to authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company to acquire, construct, maintain and operate railroads in the State of Minnesota," approved February 11, A. D. 1881; each and all of which said acts grant to and confer upon the Chicago, St. Paul, Minneapolis & Omaha Railway divers rights, powers, privileges and immunities within the State of Minnesota, the exercise of which, it is believed, will be of benefit to said railroad company; and

WHEREAS, It is deemed advisable that the company should, by formal resolution, evidence its acceptance of said acts, and the rights, powers, franchises, privileges and immunites by the same granted and conferred. Now therefore

Resolved, That the Chicago, St. Paul, Minneapolis & Omaha Railway Company hereby accept the several acts of the legislature of the State of Minnesota hereinabove referred to, and the rights, powers, privileges, franchises and immunities granted and conferred by each of said acts, *sub-*

ject to the limitations, restrictions and conditions in each of said acts contained

Resolved, That the secretary be, and he is hereby directed to file with the Secretary of the State of Minnesota a copy of the foregoing preamble and resolutions, duly certified and sealed.

I, C. W. Porter, secretary of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, do hereby certifiy that I have carefully compared the above and foregoing with the original thereof in my custody as such secretary, and that the same is a true and correct copy of said preamble and resolutions, and of the whole thereof; and I do further hereby certify that the said resolutions were duly adopted at the meeting of the Board of Directors, as set forth in the caption hereto.

In witness whereof, I have hereunto set my hand as such secretary and affixed the corporate seal of said company, this 10th day of May, A. D. 1881.

[Corporate Seal.] C. W. Porter, Secretary.

These resolutions were filed by this company in the office of the Secretary of State of Minnesota on the 10th day of May, A. D. 1881. See page 25.

It will thus be seen that it voluntarily accepted the rights granted "subject to the *limitations, restrictions*, and *conditions* in *each* of said acts contained," in as binding and solemn a manner as it was possible for it to do.

It only remains, upon this point, to add, that the above legislation is still in full force and effect, and that the legislature has not, by any subsequent legislation, relieved the appellant from any of the terms or conditions attached to said grants.

Such was the legal status of the appellant when this action was commenced, ever since has been—and is now.

4. Fully believing that as this was an action to recover upon "a cause of action arising in this state," and that the defendant in error had a right to bring

the action in the county in which he resides, and through which, the said (formerly called St. Paul & Sioux City) railroad (purchased by appellant under said chapter 219) was located and operated; this action was commenced in the State Court.

Having implicit confidence in the validity of the aforementioned legislation and its said acceptance, and not dreaming that the plaintiff in error would think of repudiating its foregoing acceptance of the same, "subject to the *limitations*, and *conditions* in each of said acts contained," this action was commenced, and proceeded therein as if it was *for the purposes of this action*, "a *domestic* corporation, and not otherwise." So regarding it, the defendant in error alleged in his complaint (p. p. 1-2) as follows:

> "That said defendant is, and for more than one year last past has been, a corporation duly organized under the laws of the State of Wisconsin, and duly authorized by the laws of the State of Minnesota to acquire, own and operate the railroads hereinafter named; and it was, and is, *for the purposes of this action*, a domestic corporation of the State of Minnesota, *under and pursuant to* the said laws thereof."

Hence it was not thought of, that plaintiff in error would claim the right to remove the case to the Federal court.

THE REMARKABLE CLAIMS OF PLAINTIFF IN ERROR.

5. We insist that the record of a more unblushing exhibition of bad faith and flagrant violation of an obligation, solemnly and deliberately entered into, is not to be found in the history of civilized government; and we emphatically deny that there are any decisions made by this court, or of any court of last resort, that sustain the plaintiff in error in its claim of right to have such a case as this removed.

after it has entered into such a contract with the state.

In brief, the claims of the plaintiff in error are these:

a. That it could *not* come into that state and acquire, own, build and operate railroads without the permission of the legislature.

b. That the legislature had the power to grant it authority to acquire, build, own and operate railroads as a *domestic* corporation; but

c. That even if the legislature did grant it these rights *upon those conditions*, and it did, by resolution, so accept them upon the terms specified, it can *repudiate* those conditions at will; as it has attempted to do in this case.

The average layman, who has been taught that "law is justice and common sense reduced to a science," will certainly be startled if these remarkable claims are sustained by the courts.

6. Our contention is that that legislature had full and ample power, under the constitution of the United States, to impose these terms and annex those conditions to that grant of authority and rights and franchises.

The legislature could have withheld the same and declined to let appellant come into the state and "acquire, construct, maintain and operate railroads in the State of Minnesota."

The plaintiff in error conceded this by then applying to the legislature for permission to come into the state for the purposes stated.

Its position manifestly is, that although it *could not* come into that state without such a grant of authority, still, if our legislature did grant that author-

ity *upon conditions*, it had no adauthority to impose such conditions, and they are void, *although subsequently accepted by appellant*, as shown; and that these conditions can be ignored by it.

THE LEGISLATURE HAS THE POWER TO ANNEX SUCH CONDITIONS TO SUCH A GRANT?

7. We insist that this is so. That that power is fundamental and inherent in the legislature must be admitted, if any rights are to be conceded to the states.

It should be here borne in mind that if the railroad upon which the respondent was injured had not been sold and transferred to a *non*-resident corporation, he could not be dragged away from his own county and home to litigate his claim for these damages.

The state had the power to impose these *conditions*, and the defendant need not accept them if it did not wish to.

> "It is within the range of a constitutional domestic policy to say to a foreign corporation, 'I will not admit you unless under specific restrictions.' For the restrictions to be placed on corporations are eminently matters of local policy."
>
> *Wharton's Conflict of Laws, sec. 105.*

At the outset we will present what we understand to be the powers of the state legislatures as to fixing the terms and conditions upon which non-resident corporations may come into their respective states and transact business, as defined by this court.

In the case of *Paul vs. Virginia, 8 Wall. 168* (181) this court, in discussing the power of the State of Virginia to impose conditions upon which non-resi-

dent insurance companies might do business in that state, said:

> "Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of *local* law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta vs. Earle*, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states, a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that *assent may be granted upon such terms and conditions as those States may think proper to impose.* They may *exclude the foreign corporation entirely;* they may restrict its business to particular localieies, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. *The whole matter rests in their discretion*"

Again in *Ducat vs. Chicago*, 10 Wall. 410, (which was a case of the same character as the last) this court said:

> "The principle of that case [Paul v. Virginia] must govern the one before us. The only difference between the statute of Virginia and that of Illinois is, that the latter is more onerous to the companies than the former. The difference is in degree, not in principle."
>
> The *power of the State* to discriminate between her own domestic corporations and those of other States, desirous of transacting business within her jurisdiction, *is clearly established* in the case

we have referred to, as it also had been in the case of *Augusta v. Earle*. As to the nature or degree of discrimination, *it belongs to the State to determine*, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union. *We find no such limitations in this case.*"

In the earlier case of *Lafayette Ins. vs. French*, 18 Howard U. S. 404, (407) this court said:

> "A corporation created by Indiana can transact business in Ohio *only* with the *consent*, express or implied, *of the latter State*. 13 Pet. 519. *This consent may be accompanied by such conditions as Ohio may think fit to impose;* and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.
>
> In this instance one of the conditions imposed by Ohio was, in effect, that the agent who should reside in Ohio and enter into contracts of insurance there in behalf of the foreign corporation, should also be deemed its agent to receive service of process in suits founded on such contracts. We find nothing in this provision either unreasonable in itself, or in conflict with any principle of public law. *It cannot be deemed unreasonable that the State of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum*, upon this important class of contracts made and to be performed within that State and fully subject to its laws, nor that proper means should be used to compel foreign corporations transacting this business of insurance within the State, for their benefit and profit, to *answer there* for the breach of their contracts of insurance there made and to be performed.

The precise point in controversy here has been decided, in express terms, we claim, by this court. In *Railroad Company vs. Harris*, 12 Wallace, 65, this

court (page 81), in discussing the powers of corporations (such as this one) operating a railroad in several States, and under legislation by the different States, said:

> "The chief point of difference between the natural and artificial person, is, that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter. It cannot migrate, but may exercise its authority in a foreign territory, *upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there.* If it do business it will *be presumed to have assented*, and will be bound accordingly."

After a reference to former decisions supporting the proposition that several states may, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one, the court said:

> "Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own, *quo ad hoc* any property within its territorial jurisdiction. That this may be done was distinctly held in *Ohio & Miss. Ry. Co. vs. Wheeler, 1 Black. 297.* It is well settled that a corporation of one state may exercise their faculties in another, so far *and under such terms*, and *to such extent* as may be permitted by the latter. We hold that the case before us is within the latter catagory. The question is always one of legislative *intent*, and *not one of legislative power or legal possibilities.*"

This extract, and especially the last sentence, certainly disposes of the claim that, under the Federal constitution, the legislature did not possess the *power* to impose these conditions. The foregoing ought, we submit, to be decisive of the question.

7. The plaintiff in error claimed, in the court be-

low, that certain cases cited by it, establish the contrary of what we claim by the foregoing, and we will here notice them to show they are not authority in point.

The case of *Railway Co. vs. Whiton, 13 Wall. 270*, does not hold to the contrary of our claim.

In that case the plaintiff was a resident of Illinois and the defendant railroad company (the Chicago & Northwestern) a corporation organized under the laws of Wisconsin. The defendant also (as in this) had been chartered by the laws of Illinois and Michigan. Upon the question as to what state it was a corporation of, it was there held to be a Wisconsin corporation, as it was there *first* incorporated, and therefore entitled to have it removed.

This is the extent of the decision in this case upon this point. It refers to *Ohio & Miss. R. Co. vs. Wheeler*, and *The Railroad Co. vs. Harris, 12 Wall. 65*, above cited by us, and, in concluding that branch of the opinion (page 285) refers to and quotes from *Railroad Co. vs. Harris*, as follows:

> "The corporation, said this Court, cannot migrate but may exercise its authority in a foreign territory *upon such conditions* as may be prescribed by *the law of the place*. If it does business there, it will be presumed to have assented and will be bound accordingly."

It will be observed that that corporation had no *conditions* imposed upon it (as in the case at bar) by the States of Illinois and Michigan when they passed those enabling acts, giving it the charter rights of a domestic corporation.

But that case does point out to plaintiff in error the distinction between its contention, upon this point, and that of the defendant in error.

That was also an action for personal injury. The statute of the State (Wisconsin) giving the right of action to plaintiff, concluded with this proviso: "provided, that such action shall be brought for a death caused in this State, and in some court established by the constitution and laws of the same."

The plaintiff in that case insisted that under this proviso he could try his case in the State court, notwithstanding the petition for removal; but upon that, this court *very properly* held to the contrary—for the manifest reason that that proviso was *ex parte*, and could not be binding upon the non-resident—and said:

> "These remedies [co-extensive with right to sue in Federal court] would not be so if any proceedings under an act of a State legislature, TO WHICH A PLAINTIFF WAS NOT A PARTY, exempting a person of such State from suit, could be pleaded to abate a suit in the circuit court.

So much for the case of *Railway Co. vs. Whitton.*

The case of *Muller vs. Dow*, 4 Otto, 444, is to the same effect as the last. The *only* question there was whether the company, having been incorporated in Missouri after being incorporated in Iowa, was an Iowa or a Missouri corporation. There was no claim of "conditions" in the Missouri act. The court held it to be an Iowa corporation, because it was first incorporated there. That disposes of that case.

The case of *N. & L. R. Co. vs. Boston & S. R. Co.*, 13 U. S. 356, is to the same effect and no more.

The case of *Moore, vs Ch., St. P., M. & O. Ry. Co.*, 21 Fed. Rep. 817, sustains our contention. In that case the plaintiff erroneously insisted that the act of the legislature made the company a domestic corporation for *all purposes*. The following from the

opinion of Mr. Justice Brewer, proves this. He there says:

> "Obviously the true reading, the intent, of this act, as a whole, was to give certain privileges to a foreign corporation *on condition* that, *for certain purposes*, it should continue to be treated as a *domestic* corporation, or to give to a foreign the right to become a domestic corporation. Regarded in that light it is a mere enabling act."

An examination of the opinion in this case will show that the only question there presented, or considered by the court, was whether the appellant was a Minnesota or Wisconsin corporation.

We have examined the papers and briefs in that case, and, in justice to Mr. Justice Brewer, it should be stated that the question here contended for (that appellant was bound by that proviso) was not presented to him for his consideration.

It should be further added, that upon that hearing, the adopting and filing, with our Secretary of State, of the aforementioned *resolution accepting* the aforesaid conditions, *was not made known to the court.*

Further comment upon this case is unnecessary.

6. The case of *Home Ins. Co. vs. Morse, 20 Wall. 445*, simply held (the Chief Justice and Mr. Justice Davis dissenting) that (p. 451) "agreements in advance to oust the court of jurisdiction conferred by law are illegal," and that a party cannot bind himself in advance by such an agreement. In the dissenting opinion Mr. Justice Davis said:

> "The State of Wisconsin has made it a condition of admission that the company shall submit to be sued in the court she has provided for the settlement of the rights of her own citizens. That is no more than saying that the foreign

company must *for the purpose of all litigation growing out of the business transacted there*, renounce its foreign citizenship and become *pro tanto* a citizen of that state. *There is no hardship in this*, for it imposes no greater burden than rests upon home companies and home insurers.

This insurance company accepted this condition, and was thus enabled to make the contract sued upon. *Having received the benefits of its renunciation, the revocation comes to late.*

But in the case of *Doyle vs. Continential Ins. Co. 4 Otto (94 U. S.) 535*, this court "receded" from what Mr. Justice Davis understood to be the position taken in *Home Ins. Co. vs. Morse*, and squarely held that "*a state has the power to impose conditions*" stating it, in the sylabus, as follows:

"A state has the right to impose conditions, not in conflict with the constitution or the laws of the United States, to the transaction of business within its territory by an insurance company chartered by another state, or to exclude such company from its territory, or, having given a license, to revoke it, with or without cause."

"The legislature of Wisconsin enacted that if any foreign insurance company transferred a suit brought against it from the State Courts to the Federal Courts, the Secretary of State should revoke and cancel its license to do business within the state. An injunction to restrain him from so doing, because such a transfer is made, cannot be sustained. The suggestion that the intent of the legislature is to accomplish an illegal result, to-wit, the prevention of a resort to the Federal Courts, is not accurate. The effect of this decision is that the company must forego such resort, or cease its business in the state. The latter result is here accomplished."

"As the state has the right to exclude such company, the means by which she causes such exclusion, or the motives of her action, are not the subject of judicial inquiry."

The case of *Memphis & Ch. R. Co. vs. Alabama*,

107 U. S. 581, also sustains us as to this. We consider it directly in point. The sylabus is as follows:

> "The Memphis & Charleston Railroad Company is made, by the statutes of Alabama, an Alabama corporation; and although previously incorporated in Tennessee also, cannot remove into the circuit court of the United States, a suit brought against it in Alabama, by a citizen of Alabama."

The *only* difference between that case and the one at bar is, that that company (a Tennessee corporation) was allowed to come into Alabama on condition that, for all practical purposes *therein*, it should be an Alabama corporation; while the plaintiff in error here "as to all actions and proceedings, *upon causes of action arising therein*, should be deemed to be a *domestic* corporation" of the State of Minnesota. That case is cited by *Dillon on Removal, sec. 104*, in support of the statement, in the text, that "when a railroad company, chartered by the laws of one State, is made a corporation of another State also, by statute, it *can not remove into the Federal Court* a suit brought against it in the second State by a citizen of that State."

That Memphis & Charleston Company was only an Alabama corporation for the *local* purposes indicated; for it is well settled that for all other purposes, it must be considered a corporation of Tennessee—the State of its original creation (*Dillon on Removal, sec. 103*, and cases cited) and that decision clearly supports our contention, that this is not a case that could be removed.

We understand the above decisions of this Court upon this point, to mean (1) that a non-resident corporation cannot enter a State to do business

therein, as such, without the permission of that State (2) that, in so granting the right to enter and do business to such a corporation, the State can impose such *conditions*, as that it shall, as to all actions arising in that State, be deemed a domestic corporation, (3) that where a corporation has been admitted into the State, such State has not thereafter the power to compel it to refrain from removing actions against it to the Federal Court; and (4) that where a corporation enters a State under a revokable license, the State still has the power to impose such a condition.

From all of which it follows that this is not a case that plaintiff in error was entitled to have removed to the Federal Court; and for that reason also, it must fail here.

FIFTH.

THE "RECORD" DID NOT SHOW A CASE FOR REMOVAL.

BECAUSE THE PETITION FOR REMOVAL DID NOT NEGATIVE THE ALLEGATION IN THE COMPLAINT, THAT THIS COMPANY "WAS, AND IS, FOR THE PURPOSE OF THIS ACTION, A DOMESTIC CORPORATION OF THE STATE OF MINNESOTA, UNDER AND PURSUANT TO THE SAID LAWS THEREOF."

1. We understand it to be well settled, in this Court, that the right of a party to the removal of a case to the Federal Court, is to be determined, in the first instance, by the facts disclosed by what is termed the "record;" and that this "record" consists of the complaint; petition and bond for removal, and order of State Court thereon.

In determining the right of a party to a "removal"

of the action, the Court looks at the complaint, as well as the petition and bond for removal, and it must affirmatively appear therefrom, as a matter of law, that the petitioning party is entitled to a removal of the cause to the Federal Court. It has been decided and is settled, that the jurisdictional *facts* must appear from the allegations of the petition, or the pleadings in the action.

Foster's Federal Practice, sec. 335;
Bondurdant vs. Watson, 103 U. S. 281;
Steamship Co. vs. Tugman, 106 U. S. 118;
Gold &c. Water Co. vs. Keyes, 96 U. S. 199 (204);
Trafton vs. Nougues, 4 Sawyer, 178;
Carson vs. Dunham, 121 U. S. 421.
Kentucky vs. L. Bridge Co. 42 Fed. R. 421.

It is manifest to us, from these decisions, that the pleadings and petition are upon the question of removal, to be considered together, and comprise that "record."

2. We insist (1) that the complaint shows that this cause is not a removable one, and (2) that the petition for removal *does not* contradict or *negative* the complaint.

We have already shown that the plaintiff in error is—although incorporated in Wisconsin—for the purposes of this action, a *domestic* corporation of the State of Minnesota.

Because of the above mentioned laws of the State of Minnesota, granting it permission to enter the state and acquire, own and operate railroads upon the conditions specified therein, and the above resolutions and acceptance of the same by plaintiff in error; the defendant in error alleged in his complaint

(page 1, 2) as facts necessary to a complete statement of his cause of action, as follows:

> "That said defendant is, and for more than one year last past has been, a corporation, duly organized under and pursuant to the laws of the State of Wisconsin, and was duly authorized by the laws of the State of Minnesota to acquire, own and operate the railroads hereinafter named; and it *was, and is*, for the purposes of the action, a *domestic* corporation of the State of Minnesota, *under and pursuant to the said laws thereof.*"

It is also alleged, among other things that, plaintiff was injured in the State of Minnesota on said St. Paul & Sioux City Railroad; then owned and operated by it.

This was all that was necessary to be alleged to state the character and status, in Minnesota, of this corporation. The court, taking judicial notice of the laws of the state, understood, as well as the company, the meaning of these allegations, and that, when not controverted, they fixed the status of this company to be (for the purposes of this suit) that of a *domestic* corporation of Minnesota, and that it was suable in the courts of that state.

3. The petition for removal did not controvert any of the above allegations of the complaint in any manner. Every *fact* stated therein was already stated in the complaint; and no *fact* was stated in the petition for removal that controverted, or was inconsistent with the allegation that, "under and pursuant to the laws thereof it was, for the purposes of this suit, a *domestic* corporation of the State of Minnesota."

"The right of removal is statutory, and *before* a party can avail himself of it, to oust the jurisdiction of the State Court, he must show upon the record

that his case is one which comes within the provisions of the statute."

Insurance Co. vs. Pechner, 95 U. S. 183.

Armory vs. Armory, 95 U. S. 186.

Gold & Water Co. vs. Keyes, 96 U. S. 199.

4. Therefore the "record" in this did not state facts that made out a case for removal. It simply showed the facts to be as we allege them, and upon which we insist defendant (plaintiff in error) to be, as to this cause and other causes of action arising in Minnesota, a *domestic* corporation of that State.

For this additional reason this cause was not "removed," and the Federal Courts have no jurisdiction to hear, try and determine the same on the merits thereof."

SIXTH.

CONCLUSION—RECAPITULATION.

In conclusion we submit that, in addition to there being no foundation in the settled law and practice for the claim here made by plaintiff in error, there is certainly no merit or justice upon which to base the same. Its whole effort is to avoid the performance of one of the most reasonable conditions upon which it was granted all the valuable rights enjoyed by the corporations of the state, and made it practically a *domestic* corporation; which conditions it by resolution accepted.

It here seeks to avoid its contract obligation by claims, as to the removal of the cause, that are as extraordinary as that it can now repudiate its *agreement* with the state.

Recapitulating, we insist that this cannot be done for the reasons:

1. That the decision of the Circuit Court, remand-

ing the case to the State Court, is *final* and conclusive.

2. That the mere filing of the papers with the clerk of the State Court, and the immediate taking and filing of a copy of those papers in the Circuit Court, without submitting them to the State Court, was not a compliance with the act of congress; and did not remove the cause to the Federal Court.

3. That having, some time after filing what it termed the "record" in the Federal Court, returned to the State Court, and submitted itself to the jurisdiction of that (State) court, by a *general* appearance therein, and moving there to vacate and set aside the judgment herein; it thereby waived its right (if any it had) to claim the action had been removed.

4. That this cause is not a removable one; because the plaintiff in error, by the aforesaid legislation, and acceptance thereof by it, is, for the purposes of this action, (at least) a *domestic* corporation of the State of Minnesota,

5. The record (complaint and petition for removal) does not show that this is a case that should be removed.

For the foregoing reasons we respectfully insist that the writs of error, in both these appeals, should be dismissed; and that the decisions of the State Supreme Court, affirming the judgment entered herein in the State Court, and the said order of the State Court, refusing to set aside that judgment, should both be affirmed by this court.

J. L. MACDONALD,
Attorney for Defendant in Error.

W. A. DAY, Of Counsel.

164-703, 704

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NOS. 14 AND 15.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN ROBERTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

SUPPLEMENTAL AND REPLY BRIEF OF DEFENDANT IN ERROR, ON RE-ARGUMENT.

J. L. MACDONALD,
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SUPPLEMENTAL AND REPLY BRIEF OF DEFENDANT IN ERROR, ON RE-ARGUMENT.

FIRST.

Upon the former argument here of this case, we, in support of the *first* point in our principal brief, called the attention of the Court to the case of *Ex parte Pennsylvania Co.*, 137 U. S. 451 (decided Dec., 1890), which is one of the last decisions of this Court, holding that, under the act of 1887, corrected in 1888 (25 Stat. 435), the decision of the Circuit Court, remanding a case to the State Court, is *final and conclusive* in every instance.

By an oversight, that case and the following quotation from the opinion of the Court in the same, was omitted and not printed.

In that case (*Ex parte Penna. Co.*) counsel for the company conceded the act of 1887—1888, as construed by this Court, in *Morey* vs. *Lockhart*, 123 U. S. 56; *Wilkinson* vs. *Nebraska, ex rel.*, etc., 123 U. S. 286; *Sherman* vs. *Grinnell*, 123 U. S. 679; *Richmond & D. R. Co.* vs. *Thournan et al.*, 134 U. S. 517 (cited in our first brief), to abolish appeals and writs of error in all cases where the Circuit Courts remanded a case to the State Court, and (as a last resort) they (in that case) applied for a writ of *mandamus* to compel the Circuit Court to take jurisdiction and try the case. The writ of *mandamus* was asked upon the theory that as the act of Congress abrogated only appeals and writs of error, and did not mention *mandamus*, a resort to that writ was still open. But this Court held otherwise, and held that it was clearly "the intention of Congress to make the judgment of the Circuit Court, remanding a cause to the State Court, *final and conclusive*," and left absolutely nothing, for the plaintiff in error in this case, to rely upon. We quote from that opinion the following:

"It was expressly held in *Railroad Co.* vs. *Wiswall*, 23 Wall. 507, that a *mandamus* would lie to compel a Circuit Court to take jurisdiction of and proceed with a case which it had wrongfully remanded to the State Court. The reason was that an order to remand was not a final judgment, and no writ of error would lie. This case is supported by the rule laid down by Chief Justice Marshall, in *Ex parte Bradstreet*, 7 Pet. 634; and, if the decision of the present case *depended only on the general rule*, the power of the Court to issue the *mandamus* would be undoubted. But, in our opinion, the matter *is governed by statute*. This will be manifest by reference to previous legislation on the subject. The fifth section of the act of March 3, 1875, (determining the jurisdiction of the Circuit Courts), provided that the order of the Circuit Court dismissing or remanding a cause to the State Court should be reviewable by the Supreme Court on a writ of error or appeal, as the case might be. 18 Stat. 470, 472. This act remained in force until the passage of the act of March 3, 1887, by which *it was superceded*, and the *writ of error or appeal* upon orders to remand causes to the State Courts *was abrogated*. The provision of the act of 1887 is as follows: "Whenever any cause shall be removed from any State Court

into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution, and *no appeal or writ of error from the decision* of the Circuit Court so remanding such cause *shall be allowed.*" 24 St. 553. This statute was reenacted August 13, 1888, for the purpose of correcting some mistakes in the enrollment (25 St. 435); but the above clause remained without change. In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of *mandamus;* and it is unquestionably a general rule that the abrogation of one remedy does not affect another. *But in this case, we think, it was the intention of Congress to make the judgment of the Circuit Court in remanding a cause to the State Court final and conclusive.* The general object of the act is to *contract the jurisdiction* of the Federal Courts. The abrogation of the writ of error and appeal would have had *little effect* in putting an end to the question of removal, *if the writ of mandamus could still have been sued out* in this Court. It is true that the general supervisory power of this Court over inferior jurisdictions is of great moment in a public point of view, and should not, *upon light grounds*, be deemed to be taken away in any case. Still, although the writ of *mandamus* is not mentioned in the section, yet the use of the words, "such remand shall be immediately carried into execution," in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to *suppress further prolongation of the controversy* by whatever process. *We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus, as well as that of appeal and writ of error.*"

That decision was reviewed by this Court in the recent case of *Missouri Pacific Ry Co.* vs. *Fitzgerald*, 16 Sup. Ct. Rep. 389, and referring to it, this Court said:

"We see no reason for reconsidering these conclusions, and it may be regarded as settled that an order of the Circuit Court *remanding a cause* cannot be reviewed in this Court by any direct proceeding for that purpose."

For the purpose of enabling us to understand the effect of the act of Congress, and of the several decisions upon it, this Court, in that opinion, said:

"A State Court cannot be held to have decided

against a Federal right when it is the *Circuit Court*, and *not the State Court*, which has *denied its possession.* * * *

As, under the statute, a *remanding order of the Circuit Court* is not reviewable by this Court, on appeal or writ of error from or to that Court, so it would seem to follow that it cannot be reviewed on writ of error *to a State Court*, the prohibition being that "no appeal or writ of error from the decision of the *Circuit Court*, *remanding* such cause, shall be allowed." And it is *entirely clear* that a writ of error cannot be maintained under section 709 in respect of such an order, where the *State Court* has rendered *no decision against a Federal right* but simply accepted the decision of the Circuit Court.

We regard this result as intended by Congress, in effectuation of the object of the act of March 3, 1887, to *restrict* the jurisdiction of the Circuit Court, and to restrain the volume of litigation, which, through the expansion of Federal jurisdiction in respect of the removal of causes, has been pouring into the Courts of the United States. *Smith* vs. *Lyon*, 133 U. S. 315, 10 Sup. Ct. 303; In re. Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141; Fisk vs. Henarie, 142 U. S. 459, 467, 12 Sup. Ct. 207."

THAT STIPULATION.

In this connection, we would again, and more particularly, call the attention of this Court to the stipulation of the parties hereto, stipulating for the entry of that judgment of the Circuit Court *remanding* this cause to the State Court, and as to the binding effect of the same. It is as follows:

"It is *stipulated* and *agreed* by and between the parties to the above-entitled action, by the attorneys therein, that the clerk of said Court may forthwith enter in said cause a formal *judgment* as of the date of the order or decision of Judge Nelson *to remand said cause* to the District Court of Scott County, in the State of Minnesota. Said judgment *shall be entered* in accordance with and *to carry out said order or decision*, and shall be as binding on the parties *in all courts and places* as if entered at the same term as that at which said order or decision was made.

Nov. 4, 1891.

J. L. MACDONALD, Plaintiff's Attorney.
JAMES H. HOWE, Defendant's Attorney.

The fact that there has been a change of counsel in this case is no reason why plaintiff in error should now attempt to ignore that stipulation.

Our claim that the judgment of the Circuit Court, remanding this case to the State Court, is *final* and *conclusive*, is therefore fully sustained by the following:

1. The said act of Congress (1888—25 Stat. 435), declaring it to be so.

2. The decisions of this Court, which we have cited and quoted from, declaring such to be the effect of that act of Congress, and holding—

3. That even *mandamus* will not lie, to compel the Circuit Court to take jurisdiction of a case which has been remanded to the State Court.

4. That the *judgment remanding* this case to the State Court, was entered herein, *nunc pro 'tunc*, upon the express *stipulation* of the parties.

5. That it was therein *stipulated* that "said *judgment shall be entered* in accordance with and TO CARRY OUT SAID DECISION, and shall be as *binding on the parties, in all Courts and places*, as if entered at the same term as that at which said order or decision was made."

6. That, as shown in our principal brief (p. 8–9), an appeal was taken to *this Court*, from that judgment, remanding this case to the State Court, and that this Court, at the October, 1891, term (*Chi., St. P., M. & O. Ry. Co.* vs. *Roberts*, 141 U. S. 690), *dismissed* that appeal; holding that an *appeal did not lie* from that judgment remanding this case to the State Court.

7. That the decision of this Court, dismissing that appeal from the judgment of the Circuit Court, *remanding* this case, makes this question—of the *finality* and *conclusiveness* of that remanding judgment—*res adjudicata* in favor of the defendant in error.

We are unable to see how that remanding judgment could be made more *final* and *conclusive*.

SECOND.

Upon our *second* point made in our principal brief, viz.: that the mere filing with the clerk in vacation, and

in the absence of the Judge and without submitting the same to the Court, and taking certified copies thereof and filing them in the Federal Circuit Court, did not effect a removal of the case, and the same was properly remanded; we wish to state, in answer to questions asked by members of the Court upon the former argument, and in *reply* to counsel, as follows:

1. The Civil Practice Code of Minnesota was first adopted by the Territory when it was organized—in 1849. It was then copied from, and almost a literal copy of, the then Code of the State of New York. It was reenacted when Minnesota became a State, and has been our Civil Code of Practice, without material change, ever since.

Under the Minnesota Code, the *process* by which a civil action is commenced, is termed a summons, which is authorized to be issued and signed by the plaintiff or his attorney.

The complaint is either attached to the summons and served with it, or it may be filed in the office of the Clerk of the Court of the proper County, and the defendant notified of that fact by the summons. Sec's 5195 to 5196, Chap. 66, Stat. of 1894.

The defendant must answer the complaint within twenty days.

If (as in this case) the complaint was attached to, and *served with*, the summons, the plaintiff is *not required to file the summons and complaint* until it becomes necessary for a record of the proceedings in the action to be made. This was allowed, by our legislature, for the obvious purpose of convenience, and to facilitate legal proceedings. Our State is divided into several Judicial Districts; each District embraces several Counties, and, as a consequence, much of the Chamber and Court business pertaining to actions pending in the several Counties is transacted with the Judge, while he is at home, or attending Court in another County. In addition to this, when papers are once filed, they can only be withdrawn from the files by the Judge, or a referee, upon an order of the Court. Rule 24.

For these reasons, attorneys are not required to, and

do not usually file the summons and complaint until after issue is joined and notice of trial is served; unless it happens that, because of some intermediate proceedings, it becomes necessary to do so.

Either party can notice the case for trial, and it thereupon becomes the duty of both parties to file their respective original pleadings and other papers that should be placed on file.

Our statute also provides (Sec. 5388, Stat. 1894) that "the District Court is *always open* for the transaction of all business," including "the hearing and determining of all matters brought before the Court or Judge, except the trial of issues of fact;" and under this provision the majority of all motions are made (upon notice) and order procured from the Judge of the District during vacation between terms.

Under the foregoing provisions of the Minnesota Code, the practice there is general and common for the plaintiff's attorney to hold the summons and complaint (where served together) until the expiration of the twenty days from the service of the summons, and if the defendant fails to answer, and an assessment of damages is required, to present the summons and complaint with proof of service and an affidavit of no answer and default, to the Judge of the District, personally or by mail, and upon them apply for, and procure, an order of reference (Sec. 5393–5394, Stat. 1894) to some person or persons, who shall try the case "as a trial by the Court," and judgment shall be entered upon the report of the referee "in the same manner as if the action had been tried by the Court."

Where a party fails to answer, or to serve notice of appearance, as defendant did in this case, he is *not entitled to notice* of the application for the appointment of a referee, or the entry of judgment.

Prior to being in default, if either applies for affirmative relief of any kind, it must be upon notice to the opposite party.

Hence it was that plaintiff's attorney, in this case, held the summons and complaint until after the defend-

ant failed to answer; and then sent them with his affidavit of default to the Judge, in support of his application of an assessment of the damages, or a reference. They were then delivered, with order of reference, to the referee; and filed by him later, with his report.

The proceedings of the plaintiff in this action, were strictly in accordance with the statute, and the same were (as counsel concedes) in all respects in conformity with the Minnesota Code and practice.

Counsel having, in his additional brief (page 2) referred somewhat in detail to the proceedings of plaintiff, for the purpose of groundless criticism, we submit that an examination of the record will show they were, briefly stated, as follows:

(*a*) Summons and complaint served Oct. 15, 1890. Time to answer, therefore, expired Nov. 4, 1890.

(*b*) Nov. 6, 1890, (*two* days after default occurred) affidavit of default and no answer (Record, p. 7–8), affidavit of default made by plaintiff's attorney, and mailed to Judge of the said State Court at Glencoe.

(*c*) Nov. 7, 1890, order appointing referee "to hear, try and determine" said action and report a judgment therein (Rec. p. 8–9) made by said State Judge.

(*d*) Nov. 20, 1890, (*thirteen days* after order of reference was made) referee qualified (Rec. p. 9) as such, and began taking testimony.

(*e*) Taking of testimony (Rec. p. 12) adjourned to Nov. 22, 1890, and then (*seven* days longer) to Nov. 29, 1890, and then completed.

(*f*) Dec. 4, 1890, (*five* days later) the report of the referee was made, and mailed to the Clerk.

(*g*) Dec. 5, 1890. Report of referee filed with Clerk of State Court, and (Rec. p. 26) judgment entered thereon.

(*h*) Dec. 30, 1890, (*twenty-five* days after entry of judgment) defendant (Rec. pp. 35 to 37) applied to the State Court "to have said judgment vacated and set

aside" (see order to show cause) upon the ground that the same had been removed to the Federal Circuit.

(*i*) Jan. 3, 1891. This motion came on for hearing, but the same was continued, from time to time, until the 17th day of January, 1891; and, upon being then informed by counsel that a motion to *remand* the case to the State Court (Judge Hicks acting) took the motion under advisement and *reserved* his decision.

(*j*) Jan. 3, 1891, (see recital in remanding order; Rec. p. 48) motion to remand the case to the State Court was heard by the U. S. Circuit Court, and taken under advisement.

(*k*) Mar. 31, 1891, the U. S. Circuit Court decided (Rec. p. 46-7) that the case had not been so "removed" as to give the Federal Court jurisdiction, and *remanded* the case. Judgment *nunc pro tunc* (Rec. p. 49) was entered Nov. 7, 1891, upon that order.

(*l*) April 13, 1891, (*thirteen* days after the case had been so remanded to the State Court) upon suggestion of counsel that case had been so remanded by the Federal Court, the State Court followed the ruling of the Federal Court, and denied the motion to vacate the judgment entered in the State Court.

It will, by this last, be seen that it was the *Federal* Court that "*first denied its possession* of the case." *Mo. Pac. Ry. Co.* vs. *Fitzgerald*, 16 Sup. Ct. Rep. 389.

It will also be seen that *thirty full days* were allowed, by plaintiff, to intervene between the date of defendant's default and failure to answer and the entry of judgment; and that defendant was, by him, allowed *twenty-five* days, after judgment, to take action assailing the judgment.

This ought to be a sufficient contradiction of any intimation or insinuation of bad faith, or sharp practice, upon the part of the plaintiff. Plaintiff could not have been more liberal or indulgent.

We are at a loss to understand why counsel should indulge in such criticism, where he is compelled to follow it with this—

"But we do not contend that the acts referred to,

however subject they may be (!) to comment, are in themselves ground for reversal."

In his same brief, counsel (p. 2), more ingeniously than fairly, says: "Up until after the judgment was entered, the defendant had no notice or knowledge of any of those proceedings subsequent to the steps taken to remove the case." Well, whose fault was it? He did not answer, or serve notice of appearance. Had he done so he would have received notice of our application for judgment.

The fact is, that plaintiff did not dream that defendant would attempt to repudiate its contract with the state, and attempt to remove the case to the Federal Court.

And had defendant followed *the correct practice*, as he should have done, and *given plaintiff notice* of the presentation of his petition and bond for removal to the Federal Court, instead of treating the State Court with contempt, and ignoring the rights of plaintiff, its counsel would not have to be here now attempting to defend a proceeding that, under the facts, is without excuse, or a parallel in the history of jurisprudence.

Had he presented his removal papers to the State Court and procured even an *ex parte* order, removing the case to the Federal Court, the Clerk of the State Court (under the statute quoted by counsel on page 2 of his additional brief) would have notified plaintiff of the fact. Nothing of the kind was done.

The petition for removal (Rec., p. 31) begins: "Your *petitioner*, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, *respectfully* shows *to this Court;* and concludes (Rec., p. 32) as follows: "Wherefore your petitioner *prays the Court to accept* this petition and said bond and to proceed no further in said suit." In the face of this, it is trifling to argue that it was not necessary to present them to the State Court.

The attempted removal would be amusing, if it was not such a flagrant and inexcusable contempt of the State

Court—a contempt which this Court will not here approve of.

Counsel (p. 3) criticises our affidavit *of default*, by saying it "does not state that he or the plaintiff had not notice or knowledge when he made that affidavit and obtained the Judge's signature to the order of reference, of the steps before taken for the removal of the case," and adds the astounding statement: "that he had then such knowledge is tacitly admitted."

We regret to say that we can find no word except that of "pettifoging" to characterize such a reference to what he says (p. 3) are not "in and of themselves ground for reversal."

Counsel knows, as well as we do, that our affidavit (Rec. 7–8) is in the usual and proper form, and that it was made in Ramsey County (St. Paul) and that as defendant had contracted and agreed with the State that it was, for the purpose of this action, a *domestic corporation*, there is only ground for saying, and believing, that we did not then dream that defendant would think of claiming it had the right to remove this case to the Federal Court.

We call the attention of the Court (1) to the following extract from our affidavit (Rec. p. 38), which counsel says "tacitly admits" that we had knowledge of the filing of the petition and bond for removal.

"That said plaintiff and this deponent did not have, or receive any notice, from said defendant of the filing of the petition for removal and bond mentioned in said affidavit, and that the same was clandestinely and secretly filed in the office of the Clerk of said Court, *without the knowledge of*, or *any notice to*, said plaintiff or said deponent."

(2) To the fact that, after learning of the defendant's "removal" proceedings, the Plaintiff done nothing further in the State Court until the Federal Court had remanded the case.

After all that he has said upon this point, he feels compelled to say (p. 3) "We admit it is *proper practice*

to apply to the *State Court* for an *order* in all such cases, when it is practicable." We have shown that it was in all respects practicable in this case. We have shown that the State Court "is *always* open," and that the defendant could easily have applied to the State Court for an order, remanding the case to the Federal Court—as easily as we applied for, and procured, the order of reference.

Had this been done, or the attention of the State Court brought to even the filing of the papers, that Court would undoubtedly have refused our application for an assessment of damages, by the Court or referee, until the application for removal had been decided by him.

The judgment of the Federal Circuit Court in remanding the case to the State Court, is clearly right; and fully sustained by the decisions of this and other Courts, which are cited in our principal brief.

THIRD.

Upon our third point, in our principal brief, we have nothing to add to what is therein stated.

FOURTH.

To this (fourth) point we wish to add, in reply to what was said upon the former argument:

1. This is not a case where the Legislature of our State attempted to abridge the jurisdiction of the Federal Courts.

The defendant sought permission to come into our State, and to purchase, own and operate a railway which was the property of a *domestic* corporation which could not compel them to submit to the inconvenience and expense of trying their case away from their own County.

2. If legislative permission had not been so granted, these Federal Courts would have no jurisdiction over cases arising upon this railroad, now owned by defendant.

3. The defendant secured permission to own and operate that road upon the express condition (accepted

by resolution of its proper officers) that, in all causes of action *arising in this State*, it would be held to be a do mestic corporation.

4. Its present claim of the right of removal of actions against it to the Federal Court, in the face of its express *stipulation to the contrary*, is a bold and inexcusable fraud upon our people, which we cannot believe this Court will legalize.

5. A nonresident natural person can, if found in the State, be sued in the State Court, and he can *waive* his right to remove the case to the Federal Court.

In the same way an artificial being, that cannot come into the State, except upon the condition of agreeing to such a *waiver*, should certainly be required to live up to its contract.

6. It is *not* a question of limiting or extending the jurisdiction of the Federal Courts; but whether our citizens shall be, by this company, dragged from their own County Courts, to try such causes at more distant and expensive places.

SHOULD THIS COURT, IN THIS CASE, HOLD THAT A STATE LEGISLATURE, IN GRANTING A FOREIGN CORPORATION PERMISSION TO ENTER THEREIN AND PURCHASE, OWN AND OPERATE RAILROADS OWNED BY ITS OWN CITIZENS, COULD NOT REQUIRE THEM TO BECOME—AS TO CAUSES OF ACTION ARISING THEREIN—DOMESTIC CORPORATIONS, IT WILL NOT ONLY SURPRISE THE PEOPLE OF THE SEVERAL STATES; BUT WILL PUT AN END TO THE GRANTING BY STATE LEGISLATURES OF ANY SUCH PERMISSION TO FOREIGN CORPORATIONS.

IN NO OTHER WAY CAN THE PEOPLE THEREOF RETAIN THEIR RIGHT TO HAVE ALL SUCH CAUSES TRIED IN THEIR OWN STATE COURTS.

Respectfully submitted,

J. L. MACDONALD,

Attorney for Defendant in Error.

164-703,

Office Supreme Court, U. S.
FILED.
DEC 12 1895
JAMES H. McKENNEY,
CLERK.

164-703-704

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

Nos. 111 and 112.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN ROBERTS, DEFENDANT IN ERROR.

I have been unable to find any law that in terms makes the act of the Minnesota legislature (chap. 219, Sp. Laws of 1881) a general law, and I have not been able to find any decision of the supreme court of the State of Minnesota directly in point. My examination is necessarily hasty.

The law of the State of Minnesota authorizing the plaintiff below (defendant in error) to plead in *general* terms that defendant railroad company is a corporation is *section 111, chapter 66, of General Statutes of Minnesota, 1878*, sustained in *Dodge vs. Minnesota Plastic Roofing Company, 14 Minn. (Gil. ed.), 39.*

The following sections of Minnesota statutes are respectfully referred to. They relate to the publication and taking effect of laws passed by the Minnesota legislature:

Sec. 2, chap. 4, of Gen. Statutes of Minn., 1878.
Sec. 55, chap. 73, of Gen. Statutes of Minn., 1878.

J. L. MACDONALD,
Attorney for Defendant in Error.

164-703, 704

164-703-704.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NOS. 14 AND 15.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

JOHN ROBERTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION FOR RE-HEARING.

THOMAS WILSON,
ATTORNEY FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NOS. 14 AND 15.

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vs.

JOHN ROBERTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION FOR RE-HEARING.

Now comes the plaintiff in error, by its Counsel, and respectfully petitions for a re-hearing of the above entitled causes and of the decision of this Honorable Court rendered in each and both thereof, wherein, by a divided Court, the judgment of the Supreme Court of the State of Minnesota was affirmed.

THOMAS WILSON,
Attorney for Plaintiff in Error.

STATEMENT OF GROUNDS ON WHICH A RE-HEARING IS PRAYED.

I.

This court having so fully considered the legal question involved in these cases, it is not without hesitancy that we make this motion, and, under the circumstances, we shall not further discuss the legal questions heretofore discussed. But it is respectfully submitted that the following facts and considerations shown by the record, or of which this Court will take judicial notice, are a justification of the motion and good grounds for a re-hearing.

(*a*) The decision of the Supreme Court of Minnesota was by a divided Court. One judge unqualifiedly dissented, and the majority freely expressed their doubt as to the correctness of their conclusion; and it may be inferred from the language used that, in making and assenting to that decision, the majority were probably influenced by the belief that "*it would doubtless be reviewed and the question settled*" *by this Court.* (Record, page 56.) It is no impeachment of the correctness of their action to say that they probably would have considered it their duty to give further and greater consideration to these cases but for the felt certainty that the rights of the parties or the legal questions involved were not finally settled by their decision. And we believe that when a judge is in doubt as to the proper decision and a review is therefore considered desirable, he is inclined, and not improperly, to decide against the party that is most able to, or that most certainly will, carry the case to the higher Court.

(*b*) The Plaintiff in Error has not had an opportunity to try the question whether it was legally responsible or in any way blamable for the injury

complained of; and even if it were conceded that the Defendant in Error had a right of action against the Railroad Company for that injury, it may be safely affirmed that the record shows the judgment to be exorbitant.

(c) As these cases, if reversed by this Court, go to the State Court for trial on the merits, no wrong or legal injury could result to the Defendant in Error, whereas if they should be affirmed by this Court by an equal division of the justices sitting, the Plaintiff in Error may not only be deprived of an opportunity to show that the alleged injury was greatly exaggerated or that there was no legal liability or blame on its part therefor, but compelled to pay a judgment utterly invalid.

We respectfully submit that for the foregoing reasons alone, this Plaintiff in Error should not be held to pay that judgment except on the *decision* of this Court that it was legally binding,—the members of this Court who have heard these cases and participated in these decisions being equally divided as to the validity of the judgment and the Court being composed of a greater number of justices before whom the case may be brought.

II.

The authorities cited in our Brief, and many others that might be cited, show that this is an open and embarrassing question in both the State and Federal Courts in the different States. It is, therefore, a matter of great public interest and importance that it should be decided by this Court of last resort—the only Court that can settle it. It will be observed that recently the Supreme Court of an adjoining State—

one of the judges dissenting—decided the question involved in this case in accordance with our contention.

North Am. Town & Trust Co. vs. *Colonial Mortgage Co.*, 54 N. W. Rep., 659.

For both of the foregoing reasons we respectfully submit that a re-hearing should be granted and the case held in this Court until the question can conveniently be considered and passed upon by the full bench.

THOMAS WILSON,
Attorney for Plaintiff in Error.

The undersigned counsel for the Plaintiff in Error in each of the above entitled suits does hereby respectfully certify that after a careful consideration of the questions of fact and law involved, and of the ground on which this petition is made, he believes these to be proper cases to be re-heard touching the matters and questions stated in the above petition; and that the grounds assigned for such petition for re-hearing are meritorious and well founded.

THOMAS WILSON,
Counsel for Plaintiff in Error.